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STONE'S INSURANCE CASES

INCLUDING

*ALL ENGLISH, SCOTCH, IRISH, CANADIAN, AND
INDIAN, AND MANY AUSTRALIAN AND NEW
ZEALAND DECISIONS RELATING TO ALL IN-
SURANCE RISKS OTHER THAN MARINE,*

TOGETHER WITH

ALL CASES UPON

WORKMEN'S COMPENSATION

AND

EMPLOYERS' LIABILITY.

BY

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TO OUR FRIENDS

J. T. G.

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BY

G. S. AND K. G. G.

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STONE'S INSURANCE CASES.

VOLUME II.

PART XXI.

ACCIDENT INSURANCE.

A. The Risk Covered.

THE cases here collected are concerned with the risk covered by accident policies or with the rules of law peculiar to, or of importance in, accident insurance. The following cases, which arose out of actions upon accident policies, being concerned with principles common to all kinds of insurance are considered elsewhere in this work, viz. : *General Accident v. Cronk* (1901), 17 T. L. R. 233 [38] (as to when contract will be deemed to be formed); *Levy v. Scottish Employers' Insurance Co.* (1901), 17 T. L. R. 229 [72] (agent has no power to settle the contract of insurance); *Life and Health Assurance Association, Ltd. v. Yule* (1904), 6 F. 437 [408]; *M'Millan v. Accident Insurance Co., Ltd.*, [1907] S. C. 484 [407] (the agent is the agent of the assured to fill in the proposal); *Perrins v. Marine and General Travellers' Insurance Society* (1859), 2 El. & El. 317 [397] (omission to state an immaterial fact does not avoid); *Marshall v. Scottish Employers' Liability and General Insurance Co., Ltd.* (1901), 85 L. T. 757 [459] (statement true when made, but untrue when policy issued, may avoid policy); *Smith v. Dominion of Canada Accident Insurance Co.*, 36 N. B. Rep. 300 [386] (as to misrepresentations relating to other insurances); *La Chapelle v. The Dominion of Canada, etc.* (1907), 33 C. S. 228 [898] (premiums paid to an agent held out as having power to receive them are deemed to be paid); *Manufacturers' Accident v. Pudsey* (1897), 27 Can. S. C. 374 [888] (as to agent's power to accept renewal premiums); *Simpson v. Accidental Death Insurance Co.*, 2 C. B. N. S. 257 [880] (a special case where, on the facts, it was held that the executors had no power to pay premiums within the days of grace); *Simpson v. Caledonian Insurance Co.*, 2 R. 209 (Quebec) [1546]; *Citizens Insurance Co. of Canada v. Boisvert* (1885), 14 R. L. 156 [1561] (as to time in which to bring action); *Lloyd Plate Glass Co. v. Powell* (1899), 16 C. S. 432 [1469] (subrogation applies to insurance against accidents to property); *Fox v. Railway Passengers' Assurance Co.* (1885), 54 L. J. Q. B. 505 [1586]; *Braunstein v. Accidental Death* (1861), 1 B. & S. 782 [1575]; *Trew v. Railway Passengers' Assurance Co.* (No. 1) (1860), 6 Jur. N. S. 759 [1576]; *Hodson v. Railway Passengers' Assurance Co.*, [1904] 2 K. B. 833 [1585]; *Hodgson v. Railway Passengers' Assurance Co.* (1882), 9 Q. B. D. 188 [1587];

Minifie v. Railway Passengers' Assurance Co. (1881), 44 L. T. 552 [1588] (as to arbitration clauses).

For injury or death to fall within the risk covered by an accident policy there must clearly be an accident, and the accident must be the cause of the loss, etc. Accident policies contain conditions or clauses designed to define the risk with precision. These conditions or clauses we shall now consider.

Firstly, as to clauses requiring the injury etc. to be "caused" by "violent, accidental, external and visible means." An accident is not so caused unless it is proved by the claimant that the means were (1) violent (*Clidero v. Scottish Accident* [1673]): (2) accidental (there is no accident if the injury is the probable result of a thing intentionally done even though the injured person did not in the least anticipate the result (*In re Scarr and The General Accident Assurance Corporation, Ltd.* [1674])). As to what amounts to an "accident," see *Fenwick v. Schmaltz* [1675]; *Sinclair v. Maritime Passengers'* [1676]; *North West Commercial Travellers' etc. v. London Guarantee and Accident* [1677]. It is not probable that any useful analogy can be drawn from the cases on accident within the meaning of the Workmen's Compensation Act, 1906; for those cases, however, see pp. 804 *et seq.*, *infra*. Shock to nerves is an accident (*Pugh v. London, Brighton and South Coast Railway* [1678]): (3) external (external means the obverse to internal, e.g., disease or weakness (*Trew v. Railway Passengers'* (No. 2) [1696]); see *Hamlyn v. Crown Accidental* [1680]; *Martin v. The Travellers' Insurance Co.* [1679]): (4) visible (this word has not been judicially construed). Besides the above it is also necessary that the injury be proximately caused by the accident. If nothing happened between the accident and the injury except what was reasonably to be expected, then the accident is to be deemed to have caused the injury (*Isitt v. Railway Passengers' Assurance Co.* [1681]); for disease to be deemed an intervening cause it must be independent of the accident (*In re Etherington and L. and Y. Acc.* [1682]). If a man is seized with a fit and falls in a pit and is drowned (*Winspear v. Accident* [1683]; *Reynolds v. Accident* [1684]), or run over by a train (*Lawrence v. Accident* [1685]), or burnt (*Wadsworth v. Canadian Railway Accident* [1686]), that is death caused by accident. So if death from hernia is expressly excluded, still the office is liable if the death is caused by an operation for hernia where the hernia was caused by an accident (*Fitton v. Accidental Death* [1687]). And although disease is the cause of death and has passed through many stages, still the office is liable if the first stage was caused by an accident and the other stages are mere developments (*Mardorf v. Accident* [1688]; *Young v. Accident Insurance Co. of North America* [1689]; but contrast *Smith v. Accident Insurance Co.* [1690]). If death is directly contributed to by a disease which existed quite apart from the accident the office is not liable (*Cawley v. National Employers'* [1691]), since death caused by disease cannot be regarded as death caused by accident (*Bobier v. Clay* [1692]). If it appears that the death might have been caused by an independent disease the burden is upon the claimant to prove that the accident caused the death (*M'Kecknie's Trustees v. Scottish Accident* [1693]; and see *Youlden v. London Guarantee and Accident* [1694]). It will be borne in mind that all

the above cases are concerned with special conditions. Although the death is caused by poison accidentally taken, yet the office will not be liable if death from poison is expressly excepted (*Cole v. Accident Insurance Co.* [1695]).

If the assured is found dead and the alternatives are death by accident or suicide the court presumes that the cause of death was an accident (*Macdonald v. Refuge Assurance* [1699]; *Harvey v. Ocean Accident* [1700]; *Young v. Maryland* [1698]). But it may be different if the office stipulate that the cause of death be proved to the satisfaction of the directors (*Harvey v. Ocean Accident* [1700]). As to what constitutes such proof, see *Trew v. Railway Passengers' Assurance* (No. 1) [1740]. As to what facts have been held to constitute proof of death by accident, see *Trew v. Railway Passengers' Assurance* (No. 2) [1696]; *Ballantine v. Employers' Insurance* [1701]; *Dominion etc. Guarantee v. McKercher* [1697]; *Young v. Maryland* [1698]. If the assured is found drowned and the alternative causes are accident or disease it is doubtful if the office can require a *post mortem* (*Ballantine v. Employers' Insurance* [1701]).

Secondly, as to special risks covered by accident policies. (1) Where the assured is insured against disablement (permanent, complete, etc.) (see *Hooper v. Accidental Death Insurance* [1702]; *Scott v. Scottish Accident* [1703]). In *Shera v. Ocean Accident and Guarantee* [1704] it was decided that "immediately . . . disable" means "directly disable." (2) Where the assured is insured against loss of sight. In *Bawden v. London, Edinburgh and Glasgow* [1705], where a one-eyed man was insured against "complete loss of sight to both eyes," it was held that the loss of sight to the one eye was within the risk since the agent knew he was one-eyed (*s. q.*). "Complete" loss of sight seems to mean complete in the medical sense and not merely complete for practical purposes (*MacDonald v. Mutual Life Association of Australasia* [1706]; *Copeland v. Locomotive Engineers' Insurance Association* [1707]). (3) Where the assured is insured against accidents when travelling. "While travelling in a railway carriage" covers an accident happening when stepping from a railway carriage at rest (*Theobald v. Railway Passengers' Assurance Co.* [1708]), but, *semble*, not if he has alighted and jumps back to avoid injury (*Wallace v. Employers' Liability* [1710]), but the office is liable if the assured has got his foot on the step preparatory to travelling (*Powis v. Ontario Accident* [1709]). Walking about a house is not a "travelling by land" (*Transit Insurance Co. v. Plamonden* [1711]). Riding a bicycle is not "travelling as an ordinary passenger" in a vehicle (*M'Millan v. Sun Life etc.* [1712]). (4) As to miscellaneous cases. An accident happening within the United Kingdom includes Jersey (*Stoneham v. Ocean etc. Accident* [1713]). Where a vehicle was overturned so that forty persons were injured and the policy expressed the risk as being injury in respect of accidents caused by vehicles, the amount recoverable to be £250 in respect of any one accident, it was held (in effect) that there were forty accidents and not one in *South Staffordshire Tramways v. Sickness and Accident etc.* [1714].

Thirdly, as to increase of risk. (1) Exposure to obvious danger. It is an exposure to obvious danger to cross a railway line (*Cornish v. Accident Insurance* [1716]); or to walk along a railway line (*Lovell v. Accident Insurance Co.* [1717]); or to pick flowers on a high

perpendicular cliff (*Walker v. Railway Passengers'* [1718]). But not to get on a train when in motion if the office knows that the assured (a superintendent of railways) usually did so (*Accident Insurance etc. v. McFee* [1719]), nor to bathe in cold and deep water, if an expert swimmer (*Sangster's Trustees v. The General Accident* [1720]). (2) More hazardous occupation. A man may be "occupied" though not employed (see *Stanford v. Imperial Guarantee and Accident* [1721]), but apparently "occupation" connotes something more than an isolated act (*McNewin v. Canadian Railway Accident* [1722]) (but we regard this case as doubtful). If notice is required of the change of risk it appears that notice to the agent is sufficient (*Smith v. Excelsior Life* [1723]). (3) Intoxication. If the policy excludes risks where the injury happens whilst assured is intoxicated it is only necessary to prove intoxication at the time of the accident (*Mair v. Railway Passengers'* [1724]; *MacRobbie v. Accident Insurance Co.* [1725]). The onus is upon the office to prove intoxication at the time the accident happened (*Haines v. Canadian Railway Accident* [1726]).

Fourthly, as to miscellaneous cases. If the assured settles, thinking the accident slight, he cannot claim again although the injury develops into something serious (*Kent v. Ocean Accident and Guarantee* [1729]). Reference may also be made on minor points to *Cornwall v. Halifax Banking Co.* [1730] (beneficiary mentioned in application but not in policy entitled by New Brunswick law); *Atkinson v. Dominion of Canada Guarantee and Accident* [1731] (construction of R. S. O., 1897, c. 203, ss. 148, sub-s. 2, 159). See also *Stokell v. Heywood* [1727] and *Carpenter v. Canadian Railway Accident* [1728], as to renewals of accident policies.

B. Notice and Proof of Accident.

In addition to the cases considered below reference should also be made to the cases following, which are partly concerned with notice of accident, viz.: *Youlden v. London Guarantee and Accident* [1694]; *Stoneham v. Ocean, Railway and General Accident* [1713]; *Haines v. Canadian Railway Accident* [1726]; *Shera v. Ocean Accident and Guarantee* [1704]. See also Vol. I., Part V.

Firstly, as to notice of accident. If the policy requires notice to be given within a given time it is no excuse that it was impossible to give notice within the time (*Gamble v. Accident Assurance* [1734]; *Patton v. Employers' Liability* [1735]). Although the policy requires, in case of death, notice to be given by the "personal representative," anybody acting on behalf of the persons interested (at least if authorised) can give notice (*Patton v. Employers' Liability* [1735]). Before a clause requiring immediate written notice of accident can operate as a condition precedent the office must prove that the assured knew or had the means of knowing the conditions of the policy (*In re Coleman's Depositories, Ltd. and Life and Health Assurance Association* [1732]). But if they have notice of the condition the condition requiring notice of accident is a condition precedent (*In re Williams and Lancashire and Yorkshire etc.* [1733]). If the time is limited from the occurrence of the accident it is the accident and not the injury which counts (*Cassel v. Lancashire and Yorkshire Accident* [1736]).

The same rule applies if “immediate” notice is required (*Accident Insurance Co. of North America v. Young* [1737]). If notice is to be given to head office notice to local manager is not sufficient (*Evans v. Railway Passengers’ Assurance Co.* [1738]).

Secondly, as to proof of accident. If a condition requires proof of accident or death satisfactory to the directors, this means such as a court of justice will deem satisfactory (*Braunstein v. Accidental Death* [1739]; *Trew v. Railway Passengers’ Assurance* (No. 1) [1740]). If proof of death is required by a condition in the policy affirmative proof is necessary and not merely notice of facts that suggest a cause of death (*Johnston v. Dominion of Canada Guarantee and Accident* [1741]; *Harvey v. Ocean Accident and Guarantee* [1700]; compare *Macdonald v. Refuge Assurance Co.* [1699]). The condition may be deemed waived if the office raises no objection to the proofs sent in until filing the defence in an action on the policy (*Fowlie v. Ocean Accident and Guarantee Corporation* [1742]).

C. Coupon Insurances.

The stamps normally required on insurance policies may, in certain cases, be compounded for with the leave of the commissioners and subject to the provisions of the Stamp Act, 1891, s. 116, and this section is expressly extended to coupon insurance by the Finance Act, 1907, s. 8, sub-s. 1. The cases upon coupon insurances are not numerous (see *General Accident Fire and Life Assurance Corporation v. Robertson* (or *Hunter*) [1743]; *Law v. George Newnes, Ltd.* [1744]; *Hunter v. Hunter* [1745]; *Shanks v. Sun Life* [1746]).

The cases are divided up as follows :—

A. The Risk Covered.

I. Injury caused by Violent, Accidental, External or Visible Means.

(1) Violent, Accidental, External or Visible Means.

(a) Violent.

(b) Accidental.

(c) External.

(2) Proximate Cause.

(3) Where the Assured is found Dead.

II. Special Risks Covered.

(1) Disablement.

(2) Loss of Sight.

(3) Accidents whilst Travelling, etc.

(4) Miscellaneous Cases.

III. Increase of Risk.

(1) Exposure to Obvious Danger.

(2) More Hazardous Occupation.

(3) Intoxication.

IV. Miscellaneous Cases.

B. Notice and Proof of Accident.

I. Notice of Accident.

II. Proof of Accident, Death, etc.

C. Coupon Insurances.

A. THE RISK COVERED.

I. *Injury caused by Violent, Accidental, External or Visible Means.*(1) *Violent, Accidental, External or Visible Means.*

(a) VIOLENT.

1673.—Clidero v. Scottish Accident Insurance Co., Ltd. (1892), 19 R. 355 (Scotland).

Under an accident policy the office was to be liable if the assured died in consequence of "bodily injury caused by violent, accidental, external, and visible means." It appeared that the deceased had complained of feeling a pain as of something having "given way inside" when he was in the act of pulling on his stockings. Death took place about thirty-six hours afterwards through failure of the heart's action due to obstruction of the colon. There was no evidence of disease in any of the organs. The medical man who examined the deceased could suggest no reason except that the deceased must have used some extra force in stooping down to draw on the stocking and so twisted the colon out of position. The deceased did not say that he made any unusual movement or exertion.

HELD—that it was not proved that the death was caused by "violent, accidental, external and visible means."

Note.—Contrast *Hamlyn v. Crown Accidental* [1680].

(b) ACCIDENTAL.

1674.—In re Scarr and The General Accident Assurance Corporation, Ltd., [1905] 1 K. B. 387.

In an action on a policy whereby the office was liable only if the assured should "sustain any bodily injury caused by violent, accidental, external and visible means" which should be "the sole and immediate cause of death of the assured" within three months of the occurrence of the accident, it appeared that one month before his death the assured, who had a weak heart, attempted to eject a drunken man from his master's premises. The extra exertion caused a strain on his heart, and the increased work of the heart under this strain rendered it, owing to its weak and unhealthy state, incapable of recovering its ordinary condition when the immediate strain ceased, the consequence being that the heart began to dilate and the dilation so set up was the cause of death. Apart from this exertion the deceased might have lived a considerable time.

HELD—that the representatives of the assured could not recover, the death not being caused by "accidental means" within the meaning of the policy.

Per Bray, J. (at p. 393): "It seems to me that there was nothing accidental in the pushing and pulling of the drunken man or the exercise of physical exertion in so doing. Scarr [the assured] intended to do this. The drunken man offered only passive resist-

ance. There was no blow. Then, was the effect on the heart accidental? The demand or strain on the heart was the natural and direct consequence of the physical exertion, which I have necessarily assumed to be violent physical exertion. Then, was the effect of this demand or strain on the heart accidental? It is true that Scarr did not foresee the effect, but this, in my opinion, cannot make it accidental if it was the natural or direct consequence of a demand or strain on a heart in the condition described. The evidence shows that there was no intervening fortuitous cause . . . ”

Notes.—In judgment *Hamlyn v. Crown Accidental Insurance Co.* [1680] is distinguished on the ground that the result was not likely to follow from the act done. The following American cases are also considered: *Fetter v. Fidelity and Casualty Co.*, 97 Am. St. Rep. 560; *Appel v. Ætna Life Assurance Co.*, 86 App. Div. Rep. S. C. N.Y. 83; *Horsfall v. Pacific Mutual Insurance Co.*, 98 Am. St. Rep. 846. The reader will find, if these cases are considered, that they all turn on the question, “Was the injury the probable result of the act intentionally done?” If yes, the office is not liable; if no, the office is liable.

1675.—Fenwick v. Schmaltz (1868), L. R. 3 C. P. 313.

Per Willes, J. (at p. 316): “An accident is not the same as an occurrence, but is something that happens out of the ordinary course of things. A fall of snow is one of the ordinary operations of nature.”

Note.—This action arose out of a charterparty incorporating the clause “riots, strikes, or any other accidents.” With the above *dictum* compare *North-West Commercial Travellers’ etc. v. London Guarantee and Accident* [1677].

1676.—Sinclair v. Maritime Passengers’ Assurance Co. (1861), 3 El. & El. 478; 30 L. J. Q. B. 77; 7 Jur. N. S. 367; 4 L. T. 15; 9 W. R. 342; 122 R. R. 802.

By a policy effected by S. with a company for granting assurance against loss of life and personal injury arising from accidents at sea, it was agreed that in case S. should sustain any personal injury from or by reason or in consequence of any accident whatsoever (with two exceptions not within the case) which should happen to him upon any ocean, sea, river, or lake during the continuance of the policy, the company should pay to him a reasonable compensation, and that if he should die from the effects of the injury, the company should pay to his executors £100. At the time of effecting the policy he was about to sail on a voyage to Aden. He proceeded on his voyage and arrived in the Cochin River on the south-west coast of India, where he was struck down by a sun-stroke while attending to his duty in the ship, and died the same day from the effects of the sun-stroke.

HELD—that the death could not be said to have arisen from “accident” within the meaning of the policy, and therefore that he could not recover.

Per Cockburn, C.J. (at 3 El. & El., p. 485): “It is difficult to

define the term 'accident,' as used in a policy of this nature, so as to draw with perfect accuracy a boundary line between injury or death by accident, and injury or death from natural causes; such as shall be of universal application. At the same time we think we may safely assume that, in the term 'accident' as so used, some violence, casualty, or *vis major*, is necessarily implied. We cannot think that disease produced by the action of a known cause can be considered as accidental."

1677.—North-West Commercial Travellers' Association v. London Guarantee and Accident Co. (1893), 10 Man. L. R. 537 (Manitoba).

The deceased had insured against death by accident. The policy contained a clause that the policy should not cover deaths caused by an injury of which there were no external or visible signs nor to any case except when some injury effected as aforesaid is the proximate and sole cause of the disability or death, and no claim could be made when the death was caused in consequence of exposure to any obvious or unnecessary danger. The deceased had been frozen to death in consequence of the waggon he was driving breaking down and so delaying him and in consequence of a sudden change in the weather.

HELD—that there was an "accident" within the meaning of the policy and no "exposure to unnecessary or obvious danger."

Note.—*Sinclair v. Maritime Passengers' Assurance Co.* [1676] distinguished.

1678.—Pugh v. London, Brighton and South Coast Railway, [1896] 2 Q. B. 248; 65 L. J. Q. B. 521; 74 L. T. 724; 44 W. R. 627.

A shock to the nerves of an employee caused by fright sustained in the discharge of his duty, and incapacitating him from employment, is an "accident" within the meaning of a policy issued by a railway company to such employee, under which a weekly allowance was agreed to be paid by the company in case of such employee "being incapacitated from employment by reason of accident sustained in the discharge of his duty in the company's service."

(c) EXTERNAL.

1679.—Martin v. The Travellers' Insurance Co. (1859), 1 F. & F. 505; 115 R. R. 950.

On an insurance against bodily injury by accident or violence, provided that the accident operated by external causes, insurers are liable for an injury to the spine caused by lifting a heavy burden in the course of business.

1680.—Hamlyn v. Crown Accidental Insurance Co., [1893] 1 Q. B. 750; 62 L. J. Q. B. 409; 4 R. 407; 68 L. T. 701; 41 W. R. 531; 57 J. P. 663.

By a policy of insurance against accident the defendants agreed to pay the plaintiff compensation if he should sustain "any bodily

injury caused by violent, accidental, external and visible means.” The policy contained a proviso that the insurance should not cover injury arising from natural disease or weakness. The plaintiff sustained injury by breaking a ligament in his knee while he was in the act of stooping.

HELD—that such injury was covered by the policy; the words “external means” must be construed as the antithesis of internal means—*e.g.*, disease or weakness.

Note.—Contrast *Clidero v. Scottish Accident* [1673].

(2) *Proximate Cause.*

1681.—*Isitt v. Railway Passengers' Assurance Co.* (1889), 58 L. J. Q. B. 191; 22 Q. B. D. 504; 60 L. T. 297; 37 W. R. 477.

The assured under a policy granted by the defendant company against “death from the effects of injury caused by accident” fell and dislocated his shoulder. He was at once put to bed and died in less than a month from the date of the accident, having been all the time confined in his bedroom. In a case stated in a reference under the defendants’ special Act the umpire found that the assured died from pneumonia caused by cold, but that he would not have died as and when he did had it not been for the accident, that as a consequence of the accident he suffered from pain and was rendered restless, unable to wear his clothing, weak, and unusually susceptible to cold, and that his catching cold and the fatal effects of the cold were both due to the condition of health to which he had been reduced by the accident.

HELD—that the death of the assured was due to the “effects of injury caused by accident” within the meaning of the policy.

Per Wills, J. (at 22 Q. B. D., p. 512): “Had the issue been submitted to a jury, I think that the proper direction would have been: ‘Do you think that the circumstances leading up to the death, including the cold which caused pneumonia, were the reasonable and natural consequences of the injury and of the conditions under which the assured had to live in consequence of the injury? If you find that no foreign cause intervened and that nothing happened except what was reasonably to be expected under the circumstances, you may and ought to find that the death resulted ‘from the effects of the injury’ within the meaning of the policy.”

The defendants’ special Act provided for the reference to arbitration of any question arising on any of their contracts of insurance, and that the “submission to any such arbitration” might be made a rule of court.

HELD—that the umpire in a reference under the Act had power to state a special case for the opinion of the court under the Common Law Procedure Act, 1854, s. 5.

1682.—*In re Etherington and Lancashire and Yorkshire Accident Insurance Co.*, [1909] 1 K. B. 591; 78 L. J. K. B. 684; 100 L. T. 568; 53 S. J. 266; 25 T. L. R. 287.

By a policy of insurance against accidental injury an insurance

company undertook that, in case such injury should within three months from the occurrence of the accident causing such injury directly cause the death of the assured, they would pay a capital sum to the legal personal representative of the assured. The policy only insured against death where accident within the meaning of the policy was the direct or proximate cause thereof, but not where the direct or proximate cause thereof was disease or other intervening cause, even although the disease or other intervening cause might itself have been aggravated by such accident, or have been due to weakness or exhaustion consequent thereon, or the death accelerated thereby. The assured fell from his horse while hunting, and thereby suffered a severe shock to his nervous system. He rode home in wet clothes, and on the following day developed signs of pneumonia, from which he died six days later. In an arbitration in respect of a claim under the policy made by his administratrix, the arbitrators found that the cumulative effect of the shock and the subsequent ride home in wet clothes was to lower the general vitality of the assured to an extent which made the onset of pneumococcus possible, and that the onset took place one hour and a half after the fall, and that he was suffering from fully developed pneumonia twenty-nine hours and a half after the fall.

HELD—that the administratrix was entitled to recover; for on the fair construction of the policy, which being ambiguous ought to be construed against rather than in favour of the company, the liability of the company was only to be excluded where death was due to disease or other intervening cause in the sense of a cause which was new and independent of the accident or which was not a natural *sequela* of the accident.

Notes.—On the point that the policy being ambiguous should be construed against rather than in favour of the office Vaughan Williams, L.J., quotes with approval the remarks of Fletcher Moulton, L.J., in *Joel v. Law Union and Crown Insurance Co.*, [1908] 2 K. B., at p. 886 [844], adopting the remarks of Lord St. Leonards in his opinion in *Anderson v. Fitzgerald* (1853), 4 H. L. C., at p. 507 [431]. *Isitt v. Railway Passengers' Assurance Co.* [1681] is relied upon. Kennedy, L.J. ([1909] 1 K. B., at p. 602), suggests that apart from express provisions in the policy the *causa proxima* is what should be regarded in accident policies, but the term “intervening cause” is narrowly construed.

1683.—*Winspear v. Accident Insurance Co.* (1880), 50 L. J. Q. B. 292; 6 Q. B. D. 42; 43 L. T. 459; 29 W. R. 116; 45 J. P. 110.

W. effected an insurance with the defendants against accidental injury, and by the terms of the policy the defendants agreed to pay the amount insured to W.'s legal representatives, should he sustain “any personal injury caused by accidental, external and visible means,” and the direct effect of such injury should occasion his death. The policy also contained a proviso that the insurance should not extend “to any injury caused by or arising from natural disease or weakness or exhaustion consequent upon disease.” During the time the policy was in force, and whilst he was crossing and tarding a stream, W. was seized with an epileptic fit and fell into the

stream, and was there drowned whilst suffering from the fit, but he did not sustain any personal injury to occasion death other than drowning.

HELD—that W.'s death was occasioned by an injury within the risk covered by the policy, and to which the proviso did not apply.

Notes.—During argument it was admitted that death by drowning would be an injury within the policy (see *Trew v. Railway Passengers'*, 6 H. & N. 839 [1696]); the question was whether in this case it was the proximate cause. Coleridge, C.J., treats the case as very like *Reynolds v. Accidental Insurance* [1684].

1684.—*Reynolds v. Accidental Insurance Co.* (1870), 22 L. T. 820; 18 W. R. 1141.

A policy against any injury from accident or violence contained a proviso "that no claim should be payable in respect of death by accident unless the same should be occasioned by some external or material cause operating upon the insured person." The claim made by the executors of an insured stated that he went to bathe, and while in a pool one foot deep he became insensible from some internal cause and fell with his face downwards; soon after he was so found, and water escaped from his lungs in such a manner as to prove that he had breathed after falling in the water. The immediate cause of death was suffocation by water, but such suffocation would not have taken place had he not been incapable of helping himself in consequence of the insensibility.

HELD—that the death was caused by "accident" within the meaning of the policy.

1685.—*Lawrence v. Accidental Insurance Co.* (1881), 50 L. J. Q. B. 522; 7 Q. B. D. 216; 45 L. T. 29; 29 W. R. 802; 45 J. P. 781.

A policy of insurance against death from accidental injury contained the following condition: "This policy insures payment only in case of injuries accidentally occurring from material and external cause operating upon the person of the insured, where such accidental injury is the direct and sole cause of death to the insured, but it does not insure in case of death arising from fits . . . or any disease whatsoever arising before or at the time or following such accidental injury, whether consequent upon such accidental injury or not, and whether causing such death directly or jointly with such accidental injury." The insured, while at a railway station, was seized with a fit and fell forwards off the platform across the railway, where an engine and carriages which were passing went over his body and killed him.

HELD—that the death of the insured was caused by an "accident" within the meaning of the policy, and that the insurers were liable.

Notes.—This case follows *Winspear's Case* [1683].

1686.—*Wadsworth v. Canadian Railway Accident Insurance Co.* (1912), 21 O. W. R. 601; 3 O. W. N. 828 (Ontario).

The insured was insured under two policies with the defendants against accident. One condition in the policies provided that if

the injury was "caused by the burning of a building in which the insured is (*sic*) in at the commencement of the fire" the company should be liable to pay double insurance. Another condition provided that if the injury was caused by fits the company should only be liable to pay one-tenth of the sum insured. The insured had a fit which caused him to drop a lantern which set fire to the building in which he was, which fire caused the injury.

HELD—(1) that the two clauses were ambiguous, and being so must be construed against the defendants, and that consequently the double insurance could be claimed.

(2) That the injury was proximately caused by the fire and not by the fit.

Per Latchford, J. (*diss.*, and agreeing with the judge of first instance): The injury was proximately caused by the fit, and the assured should only recover the tenth.

Note.—On the first point *In re Etherington and Lancashire and Yorkshire Accident Insurance Co.* [1682] was followed.

1687.—Fitton v. Accidental Death Insurance Co. (1864), 17 C. B. N. S. 122; 34 L. J. C. P. 28.

By one of the conditions of a policy against accidental death or injury, it was provided that the policy insured against cuts, stabs, concussions, etc., "when accidentally occurring from material and external cause, where such accidental injury is the direct and sole cause of death to the insured, or disability to follow his avocations"; and then followed this exception: "but it does not insure against death or disability arising from rheumatism, gout, hernia, erysipelas, or any other disease or cause arising within the system of the insured before, or at the time, or following such accidental injury, whether causing death or disability directly or jointly with such accidental injury."

HELD—that death from hernia caused solely and directly by external violence, followed by a surgical operation performed for the purpose of relieving the patient, is not within the exception.

1688.—Mardorf v. Accident Insurance Co., [1903] 1 K. B. 584.

An accident policy provided that the office should be liable if the assured died in consequence of injury caused by external and accidental violence, if such injury should be the "direct and sole cause of the death." The policy provided that there should be no liability in case of death "caused by or arising wholly or in part from 'any' intervening cause."

The assured accidentally wounded his leg with his thumb-nail. The leg became inflamed, erysipelas set in, septicæmia followed and later the assured died of septic pneumonia. It was admitted that septic germs, the development of which resulted in the man's death, were introduced into his system at the time of the infliction of the wound.

HELD—that the erysipelas, septicæmia, and septic pneumonia were not "intervening causes" but merely stages in the development

of the septic condition, and that the man's death was directly and solely caused by an accidental injury.

1689.—*Young v. Accident Insurance Co. of North America* (1891), M. L. R. 6 S. C. 3 (Quebec). Confirmed on Appeal, M. L. R. 7 Q. B. 447, and in the Supreme Court on this point, 20 Can. S. C. 280, *Accident Insurance Co. v. Young* [1737], but reversed on question of notice.

An accident policy issued by the defendants was payable “within thirty days after sufficient proof that the insured at any time during the continuance of this policy, shall have sustained bodily injuries effected through external, accidental and violent means, within the intent and meaning of this contract, and the conditions hereunto annexed, and such injuries alone shall have occasioned death within ninety days from the happening thereof . . . provided always that this insurance shall not extend to hernia, nor to any bodily injury of which there shall be no external and visible sign, nor to any bodily injury happening directly or indirectly in consequence of disease, nor to any death or disability which may have been caused wholly or in part by bodily infirmities or disease, existing prior or subsequent to the date of this contract or by the taking of poison, or by any surgical operation or medical or mechanical treatment, nor to any case except where the injury aforesaid is the proximate or sole cause of the disability or death.” The insured was accidentally wounded in the leg by falling from a verandah, and within four or five days the wound, which appeared at first to be a slight one, was complicated by erysipelas, from which death ensued twenty-three days after. There was some conflict in the evidence as to whether the erysipelas resulted solely from the wound, but it was found on the facts that the erysipelas followed as a direct result from the external injury.

HELD—that the external injury was the “proximate or sole cause of death” within the meaning of the policy, and that the plaintiff was entitled to recover.

1690.—*Smith v. Accident Insurance Co.* (1870), 39 L. J. Ex. 211; L. R. 5 Ex. 302; 22 L. T. 861; 18 W. R. 1107.

Under a policy similar to the one in *Lawrence v. Accidental Insurance Co.* [1685] the insured cut his foot accidentally against the broken side of an earthenware pan; a few days later erysipelas supervened, and of that disease he died shortly afterwards. The erysipelas was caused by the wound, and but for that he would not have suffered from it. In an action by his executrix to recover the amount assured:

HELD (Kelly, C.B., *diss.*)—that the insurers were protected by the condition and were not liable.

Notes.—*Fitton v. Accidental Death Insurance Co.* [1687] was distinguished.

1691.—Cawley v. National Employers' Assurance Association (1885),
1 Cab. & E. 597.

A policy of assurance against injury and death by accident after reciting that A., thereafter called the assured, was desirous of effecting an assurance, witnessed that the insurers accepted the risk, subject nevertheless to the several provisions thereafter contained, and to the conditions and stipulations indorsed thereon which were to be conditions precedent to the right of the assured to sue or recover thereunder.

HELD—that the conditions were conditions precedent to the right not only of the assured but of his legal personal representatives to recover thereunder.

One of the conditions provided that no claim should be made under the policy in respect of any injury, unless the same should be occasioned directly or solely by external or material causes visibly operating upon the person of the assured, whereof proof satisfactory to the insurers should be furnished, and that the policy did not insure against death, etc., accelerated or promoted by any disease or bodily infirmity, or any natural cause arising within the system of the assured, whether accelerated by accident or not. A. met with an accident, upon which death ensued, but death would not have ensued had he not at the time of the accident been suffering from gall-stones.

HELD—that the insurers were not liable.

1692.—Bobier v. Clay (1868), 27 U. C. Q. B. 438 (Ontario).

Where the deceased died from apoplexy induced by constant and excessive drinking :

HELD—that the death was not caused by an “accident caused by intoxication.”

Notes.—*Sinclair v. Maritime Passengers'* [1676] ; *Trew v. Railway Passengers'* [1696] ; and *Fitton v. Accidental Death* [1687] are referred to by Hogarthy, J. Of *Trew v. Railway Passengers'* the learned judge says (at p. 442) : “It is plain from this case, that if the proof were that he [the assured] died from an apoplectic seizure in the water, the company would not have been liable.” This present case turns largely on the view that death caused by disease cannot be regarded as death caused by accident. It is not an insurance case.

1693.—M'Kecknie's Trustees v. Scottish Accident Insurance Co.
(1889), 17 R. 6 (Scotland).

An accident policy contained the following proviso : “. . . the policy shall not extend to nor cover the death or injury of the insured . . . arising from natural disease, or weakness or exhaustion consequent upon disease, or any surgical operation, although accelerated by accident.”

The assured was thrown out of a cart and died. It did not appear clearly whether the death was caused by the accident or by disease of the kidneys.

HELD—that the burden of proving that the death was caused by the accident was upon the pursuers and that they had not discharged this burden.

1694.—Youlden v. London Guarantee and Accident Co. (1912), 21 O. W. R. 674 ; 3 O. W. N. 832 (Ontario).

Where a policy is renewed “ according to the tenour of policy 565996 ” (the original policy) the renewal is subject to the conditions contained in the original policy notwithstanding the Ontario Insurance Act, s. 144.

The deceased attempted to carry one end of a heavy piece of timber. Shortly afterwards he told his partner that he was afraid he had injured himself.

HELD—that the statement was admissible to evidence to prove the cause of death.

HELD ALSO—that the injury then suffered did cause death, there being no evidence of any other cause of death.

A condition of the policy required notice of claim to be given. It is admitted that no such notice had been given.

HELD—that failure to give notice was fatal to this claim.

1695.—Cole v. Accident Insurance Co. (1889), 61 L. T. 227.

By a policy of insurance the company agreed to pay £1,000 to the representatives of the person insured if “ the insured shall sustain any personal injury caused by accidental, external and visible means within the intention of this policy and provisions and conditions thereof, and the direct effects of such injury shall occasion the death of the insured within three calendar months from the happening of such injury.” The policy also contained the following proviso : “ The insured shall not be entitled to make any claim under this policy for any injury from any accident, unless such injury shall be caused by some outward and visible means. . . . And that this insurance shall not extend to death by suicide, whether felonious or otherwise, or to any injury caused by or arising from natural disease or weakness, or exhaustion consequent upon disease, or by any medical or surgical treatment, or operation rendered necessary by disease, although such death may have been accelerated by accident, or to any death or injury caused by duelling or fighting or any other breach of the law on the part of the insured, or by poison or intentional self-injury.” While the policy was in force the insured, by accident, drank some poison in mistake for medicine, which he was in the habit of taking, and died from the effects.

HELD—that the accident came within the proviso, and that the representatives of the insured were not entitled to recover.

(3) *Where the Assured is found Dead.*

1696.—Trew v. Railway Passengers' Assurance Co. (No. 2) (1861), 6 H. & N. 839 ; 30 L. J. Ex. 317 ; 7 Jur. N. S. 878 ; 4 L. T. 833 ; 9 W. R. 671 ; 123 R. R. 868.

A policy against accidents or violence contained a proviso that no claim should be made by the insured, in respect of any injury,

unless caused by some outward and visible means, of which satisfactory proof could be furnished to the directors of the company.

HELD—that death by drowning, where the insured had gone into the sea for the purpose of bathing only, was a death by external violence within the meaning of the policy.

An insured was twenty-six, and a clerk in the service of an iron-monger, when he effected the policy; he had been under medical treatment in consequence of having strained himself, and for five or six weeks was unable to attend to his duties at his employer's; he returned to his duties shortly before his death, which was alleged to have happened at Brighton, whither he had gone down, by leave of his employer, in order to have sea-bathing; he left his lodgings there in the evening, about seven o'clock of the day after he arrived, going towards the sea, but was never subsequently seen alive, though some clothes, identified to be his, were found, about eight o'clock, on the top of the steps of a bathing machine; and some time after this a naked body was washed up at a place on the coast about 200 miles from Brighton, which there was evidence to identify as the body of the insured, but the coroner's jury found that it was the body of a person unknown.

HELD—sufficient to go to a jury to enable them to find that the insured met his death by drowning. New trial ordered.

Notes.—See for a comment on this case *Bobier v. Clay* [1692].

1697.—Dominion, etc. Guarantee Co. v. McKercher (1911), 18 R. de J. 136 (Quebec).

An accident policy contained a condition reducing the policy moneys in case "of any injury the cause or manner of which is unknown or incapable of direct or positive proof." The assured was found dead on the railway line.

HELD—that on the evidence the cause of death had been directly and positively proved.

1698.—Young v. Maryland (1909), 10 W. L. R. 8 (Canada).

In an action upon an accident policy it appeared that the assured fell into shallow water and was drowned. No one was present. The jury found deceased had been rendered unconscious by a fall and not by disease. The policy covered injuries caused by external, violent and accidental means.

HELD—that the office was liable.

1699.—Macdonald v. Refuge Assurance Co., Ltd. (1890), 17 R. 955 (Scotland).

A policy of assurance against death contained the conditions following: "The full sum assured shall become payable if the assured shall die from accident happening at any time after the date of this policy, or shall die from any other cause after twelve calendar months from such date." "On the death of the assured the claimant under this policy shall transmit to the company's manager . . .

such evidence and information as the directors may require . . . and, if the claim is made on the ground of death from accident, satisfactory evidence of the accident."

A man insured under this policy was found drowned within two months of the date of the policy, and his daughter called upon the office to pay the policy money.

HELD—that the pursuer having brought forward evidence of the death having happened in such a manner as naturally pointed to accident it was to be inferred that the insured died from an accident and that the court would not presume that he had committed suicide, nor was the burden upon the pursuer to disprove negatively causes of death other than accident.

1700.—Harvey v. Ocean Accident and Guarantee Corporation, [1905]
2 Ir. R. 1 (Ireland).

H. insured with the defendants against bodily injury by accident arising from an outward, external, and visible means or cause, and died solely from the effects of such accident within ninety days. By a condition in the policy the defendants were not liable unless proof satisfactory to the directors was given of the cause of death. The deceased was found drowned under circumstances that pointed equally to accident or suicide. The arbitrator found as a fact, that the claimant had not given reasonable proof that the death was caused accidentally.

HELD (on appeal, reversing the King's Bench Divisional Court, on the first point)—(1) that death by drowning is death from an "outward, external and visible means or cause," and that death from such a cause is *prima facie* death by accident; and when the tribunal of fact found the evidence so equally balanced that there was precisely the same weight of evidence in favour of accident or suicide, the presumption of law against crime would entitle the claimant to recover the amount of the policy. But (2) that the claimant had not satisfied the condition requiring proof of cause sufficient to satisfy the directors, etc.

Note.—Holmes, L.J., laid some stress on the American case of *Walcott v. American Life* (1891), 33 Am. St. R. 923. See Taylor on Evidence, p. 114, on the question of presumption of innocence.

1701.—Ballantine v. The Employers' Insurance Co. of Great Britain, Ltd. (1893), 21 R. 305 (Scotland). ✓

An accident policy contained the following condition: "In the case of death the legal representatives of the assured . . . shall furnish all such other information and evidence as the directors may require from time to time, or may consider necessary or proper to elucidate the case."

The assured, while fishing, fell into the water and was drowned. The office raised the defence that death was due to disease and not accident. They (through their consulting physician) wired to the doctor of the deceased requiring a *post-mortem* examination. The doctor wired back that the relatives refused to have a *post-mortem*.

Another application for a *post-mortem* was made to a person who was neither the personal representative of the deceased nor her agent but her general solicitor (Scots, agent).

HELD—that the deceased died from accidental drowning.

HELD ALSO—that no request had been made for a *post mortem* to the “legal representatives.”

Obiter dictum, per Lord Rutherford Clark (at p. 317): “. . . if the demand [for the *post mortem*] had been [properly] made, I have the gravest doubt whether the defenders were under the [above] condition entitled to make it. It was to my mind an unreasonable demand.”

II. *Special Risks Covered.*

(1) *Disablement.*

1702—**Hooper v. Accidental Death Insurance Co.** (1860), 5 H. & N. 557; 29 L. J. Ex. 484; 7 Jur. N. S. 74; 8 W. R. 616; 120 R. R. p. 726—Ex. Ch. For the facts and the judgment of the Court of Exchequer see 5 H. & N. 546; 29 L. J. Ex. 340; 8 W. R. 616; 120 R. R. 718.

A policy against accident contained a proviso, “that in case such accident shall not cause the death of the insured immediately, but shall cause any bodily injury to the insured of so serious a nature as wholly to disable him from following his usual business, occupation, or pursuits, the company will pay to the insured a compensation in money at the rate of £5 per week during the continuance of such disability.” An insured, a solicitor and registrar of a county court, sprained his ankle severely, and was confined to his bed-room for some weeks, being unable to get down stairs. He was prevented from passing his accounts as registrar, and from attending at various places at which he was required to complete purchases for his clients.

HELD—that inasmuch as the insured was so disabled as to be incapable of following his usual occupation, business, or pursuits, he was “wholly disabled from following his usual occupation, business, or pursuits” within the meaning of the policy.

Obiter dictum, per Wightman, J. (at p. 558): “If the plaintiff had been a mathematician, whose business it was to give instruction to pupils in mathematics in his own room, I should say that such a sprain would not have wholly disabled him.”

1703.—**Scott v. Scottish Accident Insurance Co.** (1889), 16 R. 630 (Scotland).

An accident policy provided that “if the insured shall sustain any bodily injury . . . which shall occasion permanent partial disablement (as defined on the back hereof), then the company shall be liable to pay him the sum of £200.” On the back of the policy were the words: “Notice . . . Permanent, partial disablement implies the loss of one hand, the loss of one foot, or the complete and irrecoverable loss of sight.” The pursuer claimed in respect of

permanent partial disablement but admitted that he had lost neither hand, foot nor sight.

HELD—that the notice, if it did amount to a definition, which was doubtful, was ambiguous and must be construed against the office and that the action was relevant.

1704.—*Shera v. Ocean Accident and Guarantee Corporation* (1900), 32 Ont. R. 411 ; 21 Occ. N. 138 (Ontario).

An accident policy contained a clause whereby the assured was entitled to a certain weekly allowance if the accidental injury should “immediately, continuously and wholly disable” the assured. The assured met with an accident ; complete disablement supervened three weeks after the accident.

HELD—that the assured could recover ; the word “immediately” means “directly,” *i.e.*, does not refer to time but to causation.

Another clause required notice of accident to be given immediately, and another clause provided “that if in any other respect the conditions of this insurance are disregarded all rights hereunder are forfeited to the corporation.”

HELD—that the giving of notice immediately was not a condition precedent.

Notes.—As to the meaning of the word “immediately,” *Williams v. The Preferred Mutual Accident Assurance* (1893), 91 Georgia 698, and *Merrill v. The Travellers’ Insurance Co.* (1895), 91 Wis. 329, were distinguished.

(2) *Loss of Sight.*

1705.—*Bawden v. London, Edinburgh and Glasgow Assurance Co.*, [1892] 2 Q. B. 534 ; 61 L. J. Q. B. 792 ; 57 J. P. 116—C. A.

B. effected an insurance with the defendant company through their agent against accidental injury. The proposal for the insurance contained a statement by the assured that he had no physical infirmity, and that there were no circumstances that rendered him peculiarly liable to accidents, and it was agreed that the proposal should form the basis of the contract between him and the company. By the terms of the policy, the company agreed to pay the insured £500 on permanent disablement, and £250 on permanent partial disablement—the policy stating that by permanent total disablement was meant, *inter alia*, “the complete and irrecoverable loss of sight to both eyes,” and by permanent partial disablement was meant, *inter alia*, “the complete and irrecoverable loss of sight in one eye.” At the time when he signed the proposal for the insurance the assured had lost the sight of one eye, a fact of which the defendants’ agent was aware, though he did not communicate it to the defendants. The assured during the currency of the policy met with an accident, which resulted in the complete loss of sight in his other eye, so that he became permanently blind.

HELD—that it must be taken, first, that the assured had sustained a “complete loss of sight to both eyes” within the meaning of the

policy; secondly, that the knowledge of the defendants' agent was under the circumstances the knowledge of the defendants, and that they were liable on the policy for £500.

Notes.—This case turns on the general law of principal and agent. In the judgment of Esher, M.R., the agent is expressed as “having authority to negotiate and settle the terms of a proposal . . .” The proposal must be construed as having been negotiated and settled by the agent with a one-eyed man. In that sense the knowledge of the agent was the knowledge of the company.”

In the recent decision of *Taylor v. Yorkshire Insurance Co.*, [1913] 2 Ir. R. 1 [98], Palles, C.B. (at p. 16), following *Wills and Phillimore, JJ.*, in *Levy v. Scottish Employers' Insurance Co.*, 17 T. L. R. 229 [72], regarded the true *ratio decidendi* of this case as being that the proposer being an illiterate man it was the duty of the agent, as agent of the office, to put the policy into shape, *i.e.*, that the agent was the agent of the office and not of the assured when making the misstatement. See also cases given in the note to case [610]. It was relied upon in *Holdsworth v. Lancashire and Yorkshire* [1807].

1706.—*MacDonald v. Mutual Life Association of Australasia* (1910), 29 N. Z. L. R. 478; 12 Gaz. L. R. 508, 760 (New Zealand).

An accident insurance policy was payable on “complete and irrevocable loss through accident of the sight of one eye.” The plaintiff's eye was injured so as to be useless except for the purpose of distinguishing daylight from dark, but in a medical sense he was not totally blind.

HELD—that there was not “complete” loss of sight within the meaning of the policy, and thus the plaintiff was not entitled to compensation.

Notes.—Cases of *Scott v. Scottish Accident Insurance Co.* [1703]; *Anderson v. Fitzgerald*, 4 H. L. C., at pp. 510, 511 [431], distinguished as cases in which there was no exhaustive definition, for in this case the indorsement purports to be a definition. *Hooper v. Accidental Death Insurance Co.*, 5 H. & N. 546 [1702], distinguished.

1707.—*Copeland v. Locomotive Engineers' Insurance Association* (1910), 16 O. W. R. 739; 1 O. W. N. 1089 (Ontario).

The plaintiff was insured against “total and permanent loss of sight.” He was an engineer. His sight was seriously injured so as to amount to loss of sight so far as his engineering work was concerned.

HELD—that the loss was not “total and permanent” and that he could not recover.

(3) *Accidents while Travelling, etc.*

1708.—*Theobald v. Railway Passengers' Assurance Co.* (1854), 10 Ex. 45; 2 C. L. R. 1034; 23 L. J. Ex. 249; 18 Jur. 583; 2 W. R. 528; 102 R. R. 466.

A company entered into a contract of insurance with a party whereby it undertook to pay £1,000 to his legal representatives in the

event of death happening to the assured from railway accident whilst travelling in any class carriage on any line of railway of Great Britain or Ireland, a proportionate part of that sum to be paid to the assured himself in the event of his sustaining any personal injury by reason of such accident. The assured travelled in a railway carriage to a certain place, and in getting out of the carriage after the train stopped, met with an injury, without any negligence on his part, and in consequence of the step of the carriage being accidentally slippery.

HELD—(1) that this was a railway accident within the meaning of the policy.

(2) That the assured could only recover for the personal expense and pain occasioned to him by the injury, and was not entitled to damages for loss of time or loss of profit occasioned by it.

(3) That it was not a true measure of damage to assume £1,000, the sum insured, as the value of life, and estimate a proportionate sum for the injury sustained.

1709.—Powis v. Ontario Accident Insurance Co. (1901), 1 Ont. L. R. 54; Occ. N. 164.

An accident policy insured the assured against injury by accident while “riding as a passenger on a public conveyance.” The assured was injured while getting into a public conveyance after he had got his foot on the step or platform.

HELD—that the office was liable.

Notes.—*Theobald v. Railway Passengers' Assurance Co.* [1708]; *Northup v. Railway Passengers' Assurance Co.* (1869), 2 Lans., at p. 168, and the very similar case of *Champlin v. Railway Passengers' Assurance Co.* (1872), 6 Lans. 71, are cited and followed.

1710.—Wallace v. Employers' Liability Assurance Co. (1912), 21 O. W. R. 249; 3 O. W. N. 778 (Ontario).

A clause in an accident policy provided for double insurance “if the injuries were sustained while a passenger on a public conveyance.” The plaintiff received his injuries in the following way: he had stepped off a tramcar when a motor car approached, and to save himself he stepped back on the tramcar, at that moment the tram caught him and injured him.

HELD (reversing Meredith, C.J., C.P.)—that he was not at the time of the accident a passenger in the tram and single damages only could be recovered.

1711.—Transit Insurance Co. v. Plamonden (1903), 13 B. R. 223 (Quebec).

An accident policy insured against accidents befalling while the assured was “travelling by land or water.” The assured was injured while in her own house.

HELD—that the accident was outside the risk.

A contract of accident insurance made by a married woman is void according to Quebec law unless authorised by her husband.

1712.—M'Millan v. Sun Life Insurance Co. of India, Ltd. (1896), 4 S. L. T. 66 (Scotland).

A person riding a bicycle is not "travelling as an ordinary passenger" in a vehicle.

(4) *Miscellaneous Cases.*

1713.—Stoneham v. Ocean, Railway, and General Accident Insurance Co. (1887), 19 Q. B. D. 237; 57 L. T. 236; 35 W. R. 716; 51 J. P. 422.

A policy of insurance covered death caused by accident happening within the United Kingdom. The assured was accidentally drowned in Jersey. In an action on the policy:

HELD—that the accident happened within the United Kingdom.

The policy was also made subject to a condition that in case of fatal accident notice thereof must be given to the insurers within seven days. It was impossible to give notice within the seven days.

HELD—that notice was not a condition precedent to the right to recover.

1714.—South Staffordshire Tramways v. Sickness and Accident Assurance Association, [1891] 1 Q. B. 402; 60 L. J. Q. B. 260; 64 L. T. 279; 39 W. R. 292; 55 J. P. 372.

The plaintiffs, a tramway company, effected with the defendants an insurance against "claims for personal injury in respect of accidents caused by vehicles" to the amount of "£250 in respect of any one accident." One of the plaintiffs' tramcars was overturned, forty persons were injured, and the plaintiffs became liable to pay claims to the amount of £833.

HELD—that "accident" in the policy meant injury in respect of which a person claimed compensation from the plaintiffs, and that the liability of the defendants was consequently not limited to £250; but the plaintiffs were entitled to recover the amount of £833 on the policy. See also *Allen v. London Guarantee and Accident (1912)*, 28 T. L. R. 254, given in the Addenda.

1715.—McLachlan v. Accident Insurance Co. of North America (1888), M. L. R. 4 S. C. 365 (Quebec).

The life of J. S. McLachlan was insured against accident as one of the members of the firm of McLachlan Brothers, & Co., the insurers (defendants) undertaking to pay the sum of \$10,000 within ninety days after the death of one of the persons named in the policy, to the surviving representatives of the firm. One of the provisions of the policy provided that, when a member "quit the firm," the insurance should terminate. J. S. McLachlan ceased to be a partner seven months before his death by drowning, and the dissolution was duly registered. In answer to one of the questions submitted, the jury found that the firm was dissolved, "but J. S. McLachlan had a continued and active interest in the business."

HELD—that the insurance, as far as J. S. McLachlan was concerned, lapsed at the date of the dissolution of the partnership, and the fact that he continued to have an interest in the business did not entitle the other partner to maintain an action upon the policy.

On appeal, new trial ordered, on the ground that the jury were not asked, and did not state, in the precise words of the condition, whether J. S. McLachlan had “quit the firm” on November 18th.

III. *Increase of Risk.*

(1) *Exposure to obvious Danger.*

1716.—Cornish v. Accident Insurance Co. (1889), 23 Q. B. D. 453 ; 58 L. J. Q. B. 591 ; 38 W. R. 139 ; 54 J. P. 262.

A policy of insurance against accidental death or injury excepted from the risks insured against accidents happening “by exposure of the insured to obvious risk of injury.” The insured met his death through attempting in broad daylight to cross the main line of a railway in front of an approaching train by which he was run over and killed. There was no evidence that he was short-sighted or deaf. At the place where the accident happened there was no station, or proper crossing ; and there was no obstruction to prevent a person about to cross from seeing an approaching train. There was no ground for imputing negligence to the servants of the railway company.

HELD—that the risk incurred by the insured being one which either was obvious to him, or would have been obvious to him if he had been paying reasonable attention to what he was doing, the case came within the exception in the policy.

1717.—Lovell v. Accident Insurance Co. (1874), unreported. Referred to with the facts, 29 U. C. C. P. 231. Also referred to in [1716].

An accident policy contained a clause relieving the office from liability if the injury was caused in consequence of the assured “doing any unlawful act or exposing himself to any obvious risk or danger.” The assured walked along the permanent way of a railway for more than a mile. It was a short cut. He was killed by a passing train.

HELD—that there was an “exposing of himself to obvious risk or danger.”

1718.—Walker v. Railway Passengers' Assurance Co. (1910), 129 L. T. Jo. 64.

A proviso in an accident policy provided as follows : “. . . this policy does not apply to accidents or injuries . . . happening . . . by the wilful or negligent exposure of the assured to unnecessary danger or peril.” The assured was found dead at the foot of a high perpendicular sea-girt cliff. It appeared that he had set out on a walk with the intention of looking for wild flowers on the cliff. The arbitrator inferred that he had met his death in consequence of going

too near the edge of the cliff and thus running an unreasonable risk. On appeal :

HELD—that the arbitrator was right in drawing this inference.

1719.—Accident Insurance Co. of North America v. McFee (1891), M. L. R. 7 Q. B. 255 (Quebec).

M., who was described in the application for insurance as the "Superintendent of the International Railway," was insured by the appellant company against accidents. One of the conditions of the policy provided that: "The insured must at all times observe due diligence for personal safety and protection, and in no case will this insurance be held to cover either death or injuries occurring from voluntary exposure to obvious danger of any kind, nor death or disablement . . . from getting or attempting to get on or off any railway train, etc., while the same is in motion." M., when travelling on the business of his railway, was killed while getting on a train in motion.

HELD—that, inasmuch as M. was insured as superintendent of a railway, and there was evidence that his duties required him to get on and off trains in motion, of which fact the insurers had knowledge, the condition did not apply, and the company was liable.

1720.—Sangster's Trustees v. The General Accident and Employers' Liability Assurance Corporation, Ltd. (1896), 24 R. 56 (Scotland).

An accident policy contained a clause relieving the office from liability if the insured was injured "whilst . . . wilfully, wantonly, or negligently exposing himself to any unnecessary danger." The assured died, apparently from drowning (his body was not recovered, only the boat with his clothes in it), under the following circumstances. Being an expert swimmer he rowed out in a boat on a Highland loch, undressed, and bathed. It was a chilly evening. Nothing more was known except that he was used to bathing in cold water.

HELD—that his act not being manifestly dangerous under the circumstances his representatives were entitled to recover.

(2) *More Hazardous Occupation.*

1721.—Stanford v. Imperial Guarantee and Accident Insurance Co. (1908), 18 O. L. R. 562 ; 12 O. W. R. 1289 ; 13 O. W. R. 1171 (Ontario).

An accident policy insured a commercial traveller against accident. A clause provided that the amount payable should be reduced if the injury was caused by an accident happening while assured was "temporarily or permanently engaged in any occupation . . . classed by the company as more hazardous than that in which he is insured." The assured was killed whilst acting as brakesman on a trial trip preparatory to regular engagement. He was not paid for what he did but acted gratuitously as brakesman.

HELD—that the condition above-mentioned applied.

Notes.—*McNevin v. Canadian Railway Accident Insurance Co.* [1722], considered and distinguished.

1722.—*McNevin v. Canadian Railway Accident Insurance Co.* (1902), 32 S. C. R. 194; 22 Occ. N. 223 (Ontario).

An accident policy contained the following condition: "If the insured is injured in any occupation or exposure classed by this company as more hazardous than that stated in said application, his insurance shall only be for such sums as the premium paid by him will purchase at the rates fixed for such increased hazard." And again: "This insurance does not cover death resulting from voluntary exposure to unnecessary danger."

The assured was a railway servant, a baggageman. He was killed while coupling—a more dangerous occupation. He frequently coupled cars.

HELD—(1) that he could recover, the job which resulted in his death being an isolated act and not an "occupation."

(2) That having frequently coupled cars the assured would not regard the operation as dangerous and that consequently there was no voluntary exposure to unnecessary danger.

Note.—There was no classification of "exposures" by the office, so that the court did not feel called upon to decide whether the assured had "exposed" himself to danger. We submit that whether an act is dangerous or not is a question of fact not a question of the opinion of the assured.

1723.—*Smith v. Excelsior Life Insurance Co.* (1911), 20 O. W. R. 449; 3 O. W. N. 261 (Ontario).

In an action on an accident policy it appeared that the deceased engaged in more dangerous work than when insured. It appeared that notice of this fact was given to the agent of the insurers. The insurers resisted the claim on this ground of increased danger, and brought into court \$380, the amount of premiums paid after the change.

HELD—that in any event the representatives of the deceased were entitled to \$823.65, since this was admitted by the letter of their actuary.

HELD ALSO—that under the circumstances, notice having been given to the agent, the full amount of the policy was recoverable.

(3) *Intoxication.*

1724.—*Mair v. Railway Passengers' Assurance Co.* (1877), 37 L. T. 356.

In a policy of life assurance it was provided that the assurance should not extend to any death or injury happening while the assured was under the influence of intoxicating liquor, or occasioned by his wilfully exposing himself to any unnecessary danger or peril. The assured, while in such a condition that there was a conflict of evidence as to the fact of his being or not being, more or less, affected by the

liquor he had taken, accosted a woman in the street, persisting in doing so in the face of remonstrances, and was knocked down by the man in whose company she was at the time, receiving injuries from which he died.

HELD—that, to enable the company to take advantage of the above proviso, it was not necessary that the assured should be under the influence of intoxicating liquor at the time of his death, as well as at the time when the injury was sustained, but that it was sufficient to show that he was under such influence when he met with the injury from which death afterwards resulted.

“Under the influence of intoxicating liquor” means under such influence as to disturb the quiet equable exercise of a man’s intellectual faculties.

Per Lord Coleridge, C.J. (Denman, J., *dub.*): The latter part of the proviso, with regard to wilful exposure to peril, should be limited to dangers *ejusdem generis* with those recapitulated in the earlier part of the clause, and does not extend to the exceptional circumstances under which the assured met his death.

1725.—MacRobbie v. Accident Insurance Co. (1886), 23 S. L. R. 391 (Scotland).

An accident policy provided that it should not “extend to any injury happening while the assured was under the influence of intoxicating liquor.”

HELD—a sufficient breach of this condition if the assured was the worse for drink at the time he was injured to debar the assured from recovering.

1726.—Haines v. Canadian Railway Accident Co. (1910), 13 W. L. R. 709 (Canada).

By a condition in an accident policy the claimant was entitled to one tenth only of the full benefit if injured when intoxicated. On the day he was last seen, at the time he was last seen, he was intoxicated, though more sober than he had been earlier in the day. His body was found six months later in a river.

HELD—that the *onus* was upon the office to prove that he was intoxicated when accidentally drowned and that they had not discharged this *onus*.

Another condition required written notice to be given within ten days of death. It was given within ten days of the finding.

HELD—that the condition was not complied with and that the claimant could not recover.

Notes.—On the first point the American case of *Conadeau v. American Accident Co.*, 25 S. W. R. 6, was referred to. On the second point *Kentzler v. American Mutual Co.*, N. W. R. 1002, was distinguished and *Cassel v. Lancashire and Yorkshire Insurance Co.* [1736] was followed.

IV. *Miscellaneous Cases.*

1727.—Stokell v. Heywood, [1897] 1 Ch. 459; 65 L. J. Ch. 721; 74 L. T. 781. Compare *Phœnix Life Assurance Co. v. Sheridan* [859].

An accident policy of assurance with a company which provides for the payment of a premium for one year from the date thereof, and which is capable of being renewed only by consent of the company, is not a continuing policy for all purposes, but upon each renewal a new contract is entered into year by year. When, therefore, the person assured has assigned all his property, "credits, estate, and effects whatsoever," to trustees for the benefit of his creditors, and died two years afterwards from an accident, while the renewed policy was subsisting, the moneys payable thereunder do not pass to the trustees under the deed, but belong to the executors of the assured.

1728.—Carpenter v. Canadian Railway Accident Insurance Co. (1908), 18 Ont. L. R. 388 (Ontario).

In an action on a policy against accident the plaintiff (the assured) failed to prove that the contract was renewable at her instance. From the provisions of the policy it appeared to be a contract for one year only. The plaintiff proved, however, that the agent of the insurers had, after the expiry of the year, and after an accident had happened, accepted from the assured a promissory note for the renewal premium and delivered a renewal receipt which had been entrusted to the agent by the insurers, but not for such purpose.

HELD—that the facts proved did not constitute a renewal, and that R. S. O., 1897, c. 203, s. 148, sub-s. 1, was not applicable.

Notes.—The decision turned on the fact that the agent had no authority to give the renewal receipt in the circumstances, and in view of the fact that the occurrence of the accident was unknown to the insurers. Even if he had the court took the view that the evidence did not prove payment of the premiums (which by a condition in the policy was made a condition precedent to renewal). Accident and life insurance was sharply distinguished on this question of renewal.

1729.—Kent v. Ocean Accident and Guarantee Corporation (1910), 15 O. W. R. 177; 20 O. L. R. 226 (Ontario).

The assured met with an accident within the risk. He thought it was slight and accepted \$125 in full settlement. Later it developed more serious results and he brought an action to set aside the settlement.

HELD—that the liability of the office being limited to one claim for one accident, the claim having been settled no further action could be brought.

1730.—Cornwall v. Halifax Banking Co. (1902), 32 S. C. R. 442; 22 Occ. N. (New Brunswick).

By a mistake and unknown to the assured, the beneficiary

mentioned in the application for an accident policy was not named in the policy.

HELD (Davis and Mills, JJ., *diss.*) (reversing 35 N. B. Reps. 398)—that the beneficiary named in the application was entitled.

The New Brunswick Act (58 Vict. c. 25 (N. B.)) for securing to wives and children the benefit of life insurance applies also to accident insurance.

1731.—Atkinson v. Dominion of Canada Guarantee and Accident Co. (1908), 16 Ont. L. R. 619; 11 O. W. R. 449 (Ontario).

This case may be referred to on the construction of R. S. O., 1897, c. 203, ss. 148, sub-s. 2, 159 (leave to be given by trial judge if action not brought within one year), and as to when the leave may be given and as to what questions may be left to the jury where the substantial point in dispute is accident or disease.

B. NOTICE AND PROOF OF ACCIDENT.

I. *Notice of Accident.*

1732.—In re Coleman's Depositories, Ltd. and Life and Health Assurance Association, [1907] 2 K. B. 798; 76 L. J. K. B. 865; 97 L. T. 420; 23 T. L. R. 638. See S. C. [1806].

The respondents signed a proposal form for insurance by the appellants against injury by accident to their workmen, and received a cover note, signed by the appellants' local agent, which contained the words "cover to hold good from this date." A few days subsequent to the receipt of the covering note, one of the respondents' workmen received injuries in the course of his employment which resulted in death nearly three months later. A policy, sealed by the appellants the day following the accident, but only delivered to the respondents about a week later, contained a clause that "the employer shall give immediate notice to the" appellants "of any accident . . . and shall forward to the" appellants "every written . . . notice of claim received within three days after receipt" thereof, and also a clause that the observance and performance by the respondents of the times and terms above set out, so far as they contained anything to be done by the respondents, were to be of the essence of the contract. No notice of the accident was given until the day before the workman's death, when verbal notice was given to the appellants' local representative. Subsequent to the workman's death written notice of a claim by his dependants for compensation was given to the respondents; but this was not forwarded to the appellants, who were merely informed by letter that such a claim had been made. The appellants having repudiated liability, the respondents, in arbitration proceedings, settled the claim for compensation, and sought to recover the amount so paid from the appellants.

HELD (Vaughan Williams, L.J., and Buckley, L.J.; Fletcher Moulton, L.J., *diss.*)—that the giving of immediate notice of the accident was not a condition precedent to the respondents' right to recover, inasmuch as, in the absence of evidence that the respondents knew or had the opportunity of knowing the conditions of the

policy (the *onus* of proving which lay on the appellants), the risk undertaken by the appellants for the period prior to the delivery of the policy did not impose upon the respondents the obligation to give such notice prior to the receipt by them of the policy or of information that it contained such a condition.

HELD ALSO—that the appellants, by repudiating the claim for compensation, had waived performance of the condition that the respondents should forward to the appellants the written notice of claim for compensation within three days after receipt thereof by the respondents.

Quere, whether upon the construction of the policy as a whole, apart from the particular circumstances, the condition was a condition precedent.

Notes.—Reference may also be made to *Stoneham v. Ocean, etc.* [1713].

1733.—In re Williams and Lancashire and Yorkshire Accident Insurance Co. (1903), 51 W. R. 222 ; 19 T. L. R. 82.

Employers took out a policy of insurance against injury to their workmen under (*inter alia*) the Workmen's Compensation Act, 1897. Clause 3 of the policy provided that the employers were "to give immediate notice to the company of any accident causing injury to a workman," and that "time should be the essence of this condition." At the foot of the policy was a notification that every notice to be given by the assured should be in writing sent by post to, or delivered at, the head office of the insurance company. An accident having happened to a workman on October 10th, 1900, the employers notified the fact of the accident by telephone to the person who had introduced the insurance company to them. The employers received a notice in writing from the injured workman dated December 1st, 1900, of his intention to claim compensation, and they forwarded this notice to the insurance company on December 4th. An award of compensation under the Act of 1897 having been made in favour of the workman, the employers claimed to be indemnified by the insurance company.

HELD—that the giving of immediate notice of the accident was a condition precedent to the employers' right to be indemnified, that the communication to the person who had introduced the employers to the company was not notice to the company, and that therefore the company were not liable.

1734.—Gamble v. Accident Assurance Co., (1869) Ir. R. 4 C. L. 204 (Ireland).

The provisions of a policy issued by an assurance company, making it a condition precedent to the right to recover that a notice, specifying the particulars of the accident, should be delivered at the chief office of the company, in London, within seven days after its occurrence, apply to cases where owing to the sudden character of the accident, and its resulting in instantaneous death, there was nobody capable of giving the required notice.

The provision is not discharged by reason of the fact that owing to the act of God the accident was of so sudden and fatal a character that it was impossible to have given the required notice within the specified time.

1735.—Patton v. Employers' Liability Assurance Co. (1887), 20 L. R. Ir. 93 (Ireland).

A policy of insurance against accident was made, subject to the condition, *inter alia*, that in the event of any accident to the assured he, or his representatives; should give notice thereof in writing to the company within ten days after its occurrence, stating the number of the policy, nature and date of the injuries, place where, and manner in which they were received, extent of disablement, and name, address, and occupation of the person injured, and also within fourteen days of the accident, forward to the head office a written report from the assured's medical attendant, who should be a duly qualified and registered medical practitioner, of the facts of the case, and nature and extent of the injuries received and the condition, provided that unless it were complied with as to time and otherwise (time being of the essence of the contract), no person should be entitled to claim under the contract.

HELD—that the omission to give notice of death within the prescribed time, even when death was instantaneously caused by the accident, was an answer to a claim made upon the policy.

HELD ALSO—that it was not necessary that the notice should be given by the legal personal representatives of the assured, but might be effectually given by any person appointed by the assured for the purpose, or (*per* Murphy, J.) by any person acting on behalf of the persons interested in the policy.

HELD ALSO—that any excuse for not forwarding the medical report, as, *e.g.*, that there was no one in medical attendance on the assured, should be specially pleaded and proved, when the company rely on the condition.

Notes.—In judgment this case is treated by both Harrison and Murphy, JJ., as indistinguishable in principle from *Gamble's Case* [1734].

1736.—Cassel v. The Lancashire and Yorkshire Accident Insurance Co., Ltd. (1885), 1 T. L. R. 495.

An accident policy required the assured to give notice of the occurrence of the accident and of the injuries received within fourteen days of the date of the accident. The assured met with an accident in July, but was not aware that he had received injury until the March following, when he at once gave notice.

HELD—that this was not notice within the time limited by the policy, and that the office was not liable.

1737.—Accident Insurance Co. of North America v. Young (1891), 20 S. C. R. 280 (Quebec App.).

The policy provided that “in the event of any accident or injury for which claim may be made under this policy, immediate notice must be given in writing, addressed to the manager of this company at Montreal, stating full name, occupation and address of the insured, with full particulars of the accident and injury; and failure to give such immediate written notice shall invalidate all claims under this policy.”

On March 21st, 1886, the insured was accidentally wounded in the leg by falling from a verandah, and within four or five days the wound, which appeared at first sight to be a slight one, was complicated by erysipelas, from which death ensued on April 13th following. The local agent of the company at Simcoe, Ontario, received a written notice of the accident some days before the death, but the notice of the accident and death was only sent to the company on April 29th, and the notice was only received at Montreal on May 1st. The manager of the company acknowledged receipt of proofs of death, which were subsequently sent without complaining of want of notice, and ultimately declined to pay the claim on the ground that the death was caused by disease, and therefore the company could not recognise their liability. On appeal to the Supreme Court:

HELD (Tournier and Patterson, *diss.*)—that the company had not received sufficient notice of the death to satisfy the requirements of the policy, and that by declining to pay the claim on other grounds there had been no waiver of any objection which they had a right to urge in this way.

1737a.—Employers' Liability Assurance Corporation v. Taylor (1898), 29 S. C. R. 104 (New Bruns. App.).

By a condition in an accident policy written notice of accident was required containing the full name and address of the assured, with full particulars of the accident, the notice to be given within thirty days of the accident to the manager for the United States or to the local agent.

HELD (Gwynne, J., *diss.*)—that the giving of such notice was a condition precedent to the right to bring action on the policy.

Notes.—This case was followed in *Atlas Assurance Co. v. Brownell*, 29 S. C. R. 537 [776].

1738.—Evans v. Railway Passengers' Assurance Co. (1912), 21 O. W. R. 442; 3 O. W. N. 881 (Ontario).

A condition in an accident policy invalidated claims unless written notice thereof was given to the head office within ten days of the happening. Verbal and written notice was given to the local manager within the ten days but not to the head office.

HELD—plaintiff's claim was invalidated.

Notes.—*Gamble v. Accident Assurance Co.* [1734] followed.

II. *Proof of Accident, Death, etc.*

1739.—Braunstein v. Accidental Death Insurance Co. (1861), 1 B. & S. 782; 31 L. J. Q. B. 17; 8 Jur. N. S. 506; 5 L. T. 550.

A policy was entered into with a company against bodily injury from any railway accident directly affecting the assured while travelling on any line of railway in Great Britain or Ireland by a passenger train propelled by steam. One of the conditions in the deed of settlement of the company, which by the terms of the policy was incorporated with it, provided that before payment of the sum insured by any policy, proof of the death or accident, satisfactory to the directors of the company, should be furnished by the claimant, together with such further evidence or information, if any, as the directors should think necessary to establish the claim.

HELD—that this must be understood to mean such evidence or information as the directors might reasonably, and not such as they might unreasonably and capriciously, require.

There was a condition indorsed on the same policy, that in case of difference of opinion as to the amount of compensation payable in any case, the question should be referred to arbitration.

HELD—reference to arbitration in the manner prescribed by the parties as a condition precedent to bringing an action for an injury within the policy.

Notes.—During argument Wightman, J., distinguished the case of *Worsley v. Wood* [831]. On the question of construction of the agreement the *dictum* of Ashhurst, J., in *Hotham v. The East India Co.*, 1 T. R. 638, 645, that the intention of the parties must be regarded is cited with approval by Crompton, J., and the maxim "*Verba fortius accipiuntur contra proferentem*" is applied by Blackburn, J.

1740.—Trew v. Railway Passengers' Assurance Co. (No. 1), 6 Jur. N. S. 759. See S. C. [1576].

A policy of assurance against injuries caused by accident or violence contained a proviso that no claim should be made under it in respect of any injury unless the same should be caused by some outward and visible means, of which satisfactory proof could be furnished to the directors.

HELD—that this must be understood to mean such proof as a court of justice would determine ought to be satisfactory to the directors.

1741.—Johnston v. Dominion of Canada Guarantee and Accident Insurance Co. (1908), 17 O. L. R. 462; 12 O. W. R. 980—(Ontario).

A condition in an accident policy required "immediate written notice with full particulars and full name and address of insured is to be given to the company at Toronto of any accident and injury for which claim is made. Unless affirmative proof of death, loss of limb, or sight, or duration of disability, and their being the proximate

result of external violent, and accidental means, is so furnished within thirteen months from the time of such accident no claim based thereon shall be valid." Written notice was given of the fact that the assured was killed in a railway accident; time and place were given but no affirmative proof that death was the proximate result of external, violent and accidental means.

HELD—that the condition had not been complied with and that the representatives of the assured could not recover.

Mere notice is not proof.

Immediate notice means reasonably expeditious notice.

Notes.—Compare *Harvey v. Ocean Accident and Guarantee* [1700]; *Macdonald v. Refuge Assurance Co.* [1699].

1742.—Fowlie v. Ocean Accident and Guarantee Corporation (1902), 33 S. C. R. 253. Affirming 4 Ont. L. R. 146 (Ontario).

An accident policy required proofs of loss to be delivered within a certain time. They were delivered within the time but were incomplete. No objection was taken to them, but the claim was resisted on the ground that the assured committed suicide. Two years after the death the office delivered its defence, and therein for the first time raised the question as to the sufficiency of the proofs.

HELD—that they had waived their right to raise this defence.

Notes.—This case may also be referred to on the question of the sufficiency of the jury's finding in a case where the question was accident or suicide.

C. COUPON INSURANCES.

1743.—General Accident Fire and Life Assurance Corporation v. Robertson (or Hunter), [1909] A. C. 404; 79 L. J. P. C. 1; 101 L. T. 135; 53 S. J. 649; 25 T. L. R. 685—H. L. (Sc.).

The appellants inserted in a Letts Diary a "coupon" insurance policy undertaking to pay £1,000 to any person killed in a railway accident, "Provided that at the time of such accident the person so killed . . . was the owner of the publication in which this assurance coupon is inserted, that such person had duly caused his or her name to be registered at the head office of the corporation in Perth, and had paid the fee for registration and cost of acknowledgment, and that notice of claim is sent to the registered office . . . within fourteen days of the occurrence of the accident, and that such claim be made within twelve months of the registration of the holder's name." The respondent's husband on December 25th, 1905, sent the form of application for registration with the required remittance. He was injured in a railway accident on December 28th, 1906, and died on December 29th. The claim was made on January 2nd, 1907. It was not proved that registration took place before January 2nd, 1907.

HELD—that the burden of proof that the registration was effected before January 2nd, 1907, rested on the appellants, and had not been discharged, and that they were liable on the policy.

1744.—Law v. George Newnes, Ltd. (1894), 21 R. 1027 (Scotland).

The proprietors of a newspaper advertised that £100 would be paid by a certain insurance office to the person whom the proprietors "may decide to be the next of kin of anyone who is killed in a railway accident," provided that a copy of the current issue was in his possession at the time of the accident or that he was a regular subscriber.

The defence to an action by the children of the deceased was that the proprietors had decided that the widow was the next of kin and that the money had been paid to her.

HELD—that it was a condition precedent to recovery that the claimant should produce the decision of the proprietors that claimant was next of kin, and that pursuers had failed to prove that the proprietors had acted in bad faith.

Per Lord Young (at p. 1031): "I do not think that there was anything of the nature of a contract undertaken by the proprietors . . . I hesitate to allow to pass without an expression of doubt the idea that is presented to us by this case, that there is here a valid contract or obligation by the law of Scotland to pay £100—that it is a valid policy of insurance."

1745.—Hunter v. Hunter (1904), 7 F. 136 (Scotland).

A weekly periodical named *Answers* contained a statement that in the event of any person being killed by an accident to any train in which he was travelling as a passenger with a copy of the current number in his possession, £1,000 would be paid to "the person adjudged by the editor to be the next-of-kin of the deceased." It was added that "the person or persons who shall be adjudged by the editor to be the next-of-kin of the deceased shall be the only person or persons entitled to receive and give a valid discharge for the money." A person was killed in an accident to a train in which he was travelling, having in his possession a copy of the current number of *Answers*. He was survived by three brothers and a sister. After enquiry, the editor adjudged the sister to be his next-of-kin, and paid £1,000 to her. In an action by the brothers against her:

HELD—that they had no right to share in the sum so paid.

Notes.—The Lord Justice-Clerk based his judgment on the rule in *Law v. George Newnes, Ltd.* [1744], where it was laid down that an editor may nominate whom he pleases as next-of-kin provided he acts *bonâ fide*. Lords Young, Trayner and Moncrieff also laid particular stress on that case.

1746.—Shanks v. Sun Life Assurance Co. of India, Ltd. (1896), 4 S. L. T. 65 (Scotland).

A yearly subscriber to a weekly journal which contained an insurance coupon was killed by accident on August 10th. His last payment to the account of the paper was on August 8th, but there was delivered to him a copy with a coupon insuring "the owner of this insurance coupon" against accidents happening on (*inter alia*) August 10th. He had given no notice to terminate his subscription.

HELD—that his representatives were entitled to recover.

PART XXII.

FIDELITY INSURANCE.

FIDELITY insurance is to be kept distinct from fidelity guarantee, though several of the cases which follow are decided upon fidelity guarantee contracts—on points common to fidelity insurance and fidelity guarantee. It would seem on principle that since in fidelity insurance offices rely on the assured to inform them of all facts necessary to calculate the risk, that this contract, like the contract of life insurance, is one *uberrima fidei*, so that non-disclosure or innocent misrepresentation of a material fact (but not of mere opinion or intention) avoids (see, as to this, *Smith v. Bank of Scotland*, [1747]; *Benham v. United Guarantee* [1748]; *Towle v. National Guardian* [1749]; contrast *Byrne v. Muzio* [1750]). The rule (as to non-disclosure) is otherwise in the case of fidelity guarantee (*North British Insurance v. Lloyd*, 10 Ex. 523 [366]). But even in cases of fidelity guarantee suppression of the fact that the person whose fidelity is guaranteed is known to have acted improperly will discharge the surety (*Smith v. Bank of Scotland* [1747]; *Confederation Life v. Brown* [1754]; contrast *Byrne v. Muzio* [1750]). Material misrepresentations entitle the office to avoid, if they are misrepresentations of fact and not merely of intention (*Hay v. Employers' Liability* [1752]); even if the person making them is not proved to have been authorised (*Elgin Loan, etc. v. London Guarantee and Accident* [1751]).

The cases are to some extent conflicting as to the position where the assured or the employer represents that certain checks will be enforced over the accounts, etc., and these checks are not put in force. It depends to some considerable extent whether the party representing is the assured or not, but the cases cannot be reconciled upon this ground alone. See *Benham v. United Guarantee* [1748]; *Regina v. National Insurance* [1748a]. Contrast *Towle v. National Guardian* [1749]; *Haworth v. Sickness and Accident* [1749a]. See also *Elgin Loan and Savings Co. v. London Guarantee and Accident* [1751]; *Hay v. Employers' Liability* [1752]; *McDonald v. London Guarantee and Accident* [1761]; *Dougharty v. London Guarantee and Accident* [1761a].

If the risk is enhanced the surety is discharged (*Société des Artisans Canadiens-Français v. Trudel* [1757]), e.g., by the employer continuing the employment after he has discovered the servant is dishonest (*Phillips v. Foxall* [1753]; *Sanderson v. Aston* [1755]); or by employing the employee in more responsible work (*Wembley Urban District Council v. Poor Law, etc. Officers' Mutual Guarantee* [1756]) (but the addition of an entirely fresh office, fidelity in which is not guaranteed, does not discharge the surety (*Skillet v. Fletcher* [1758])); or by varying the employee's salary from a fixed salary

to one based on commission (*The North Western Railway v. Whinray* [1759]); or by altering the nature of the employment materially in any way (*Oswald v. Mayor of Berwick* [1760]). *A fortiori* if the employee is given work to do which the policy expressly stipulates that he shall not do (*McDonald v. London Guarantee and Accident* [1761]).

If the liability of the office is expressed to date from the issue of the policy and a policy is issued, the risk commences, although the premium has not been paid (*Allis Chambers & Co. v. Fidelity and Deposit Co. of Maryland* [1762]). If the policy guarantees the fidelity of a man in his employment as assistant overseer this does not cover loss due to defalcations as parish clerk (*Cosford Union v. Poor Law, etc. Mutual* [1763]). For the risk covered where the policy covers loss caused by "fraud and dishonesty amounting to embezzlement," see *Debenhams, Ltd. v. Excess Insurance Co.* [1764]; *London Guarantee v. The Hochelaga Bank* [1765]). If the policy covers loss caused by dishonesty "committed and discovered" during a certain period the dishonesty must be both committed and discovered within that period (*Commercial Mutual v. London Guarantee and Accident* [1766]). It is an "irregularity" for a bank manager to allow X. to overdraw knowing that X. is not good for that sum (*European Insurance v. Bank of Toronto* [1767]). If the guarantee covers all losses which the employer is bound to make good at law this covers negligence on the part of an employee (*Citizens v. Grand Trunk Railway* [1768]). If a teller embezzles and covers his operations by falsifying the books so that the loss is not discovered for years the office is only liable for losses caused by embezzlements during the time covered by the policy (*Banque Nationale v. L'Espérance* [1769]). The office may be liable although the employee is tried for larceny and acquitted (*Protestant Board of School Commissioners v. Guarantee Co. of North America* [1770]).

Fidelity guarantee insurance is a contract of indemnity, and the office's liability, unless expressly limited, is therefore equal to the assured's loss (*Crown Bank v. London Guarantee and Accident* [1771]; *Fifth Liverpool, etc. v. The Travellers' Accident* [1772]). For an interesting case where the person who suffered the loss was not a party to the guarantee contract but was held entitled to join with the party to the contract to sue on it, see *Kenney v. Employers' Liability* [1773]. Thus, if stolen goods are recovered the insurer, if he has indemnified the assured, can claim them, but the assured must be indemnified all reasonable costs incurred in recovering them (*Hatch, Mansfield & Co. v. Weingott* [1774]). Contribution applies, of course, in the case of concurrent insurances of the same risk (see *American Surety Co. v. Wrightson* [1775]; *City of London Fire v. Citizens'* [1776]).

Most fidelity guarantee policies contain clauses requiring the assured to (1) prosecute and give the office all possible aid in obtaining reimbursement, etc; (2) give notice of the loss to the office immediately. As to (1) see *London Guarantee and Accident v. Fearnley* [1777]; *Commissionnaires d'École, etc. v. The Employers' Liability Assurance Co.* [1778]; *Cannadienne Comp. d'Assurance, etc. v. London Guarantee and Accident* [1779]. As to (2) see *London Guarantee and Accident v. Hochelaga Bank* [1765]; *Ward v. Law*

Property Assurance and Trust Society [1780]; *Molson's Bank v. Guarantee Co. of N. A.* [1781]; *Harbour Commissioners of Montreal v. Guarantee Co. of N. A.* [1782]. For a Canadian decision on the effect and scope of Ont. Ins. Corp. Act, 1892, s. 33, see *Village of London West v. London Guarantee and Accident* (1895), 26 Ont. R. 520.

Fidelity insurance is not contrary to public policy as tending to increase infidelity. See *per* Jessel, M.R., *In re Norwich Provident (Bath's Case)* (1878), 47 L. J. Ch. 601 [128].

The cases are divided up as follows :—

- I. Misrepresentation or Concealment.
- II. Increase of Risk.
- III. Risk.
 - (a) Commencement of Risk.
 - (b) Risk covered.
- IV. Extent of Office's Liability.
- V. Duties of Assured.
 - (a) To Prosecute, etc.
 - (b) To give Notice, etc.

I. *Misrepresentation or Concealment.*

1747.—**Smith v. Bank of Scotland** (1813), 1 Dow, 272—Scot. App.

Per Lord Eldon (at p. 292): "If an agent had been guilty of embezzlement, or other improper conduct unknown to his employer, the cautioner [or person guaranteeing his fidelity] would be liable. But if a man found that his agent had betrayed his trust, that he owed him a sum of money, or that it was likely he was in his debt; if under such circumstances he required sureties for his fidelity, holding him out as a trustworthy person, knowing, or having ground to believe, that he was not so; then it was agreeable to the law of England, that no one should be permitted to take advantage of such conduct, even with a view to security against future transactions."

1748.—**Benham v. United Guarantee and Life Assurance Co.** (1852), 7 Ex. 744; 21 L. J. Ex. 317; 16 Jur. 691; 86 R. R. 821.

An insurance company effected a policy with a literary institution to a certain amount against loss which might be occasioned by the want of integrity, honesty, or fidelity of W., in his employment as secretary to the institution. The basis of the contract was alleged to be a statement in writing, by the treasurer of the institution, containing a declaration of the truth of the answers to certain questions, with a proviso, that any fraudulent misstatement or suppression should render the policy void. The statement contained the following questions and answers:—First, "Is the applicant at present in your employment, and if so in what capacity, and has he hitherto performed the duties of his situation faithfully and to your satisfaction?"—A. "He is secretary to the — Literary Institution." Secondly, "Is the applicant personally known to you, or any of your firm, or by whom has he been introduced or recommended to you?"—A. "Only as above." Thirdly, "In what capacity do you intend to employ the applicant; and with reference to this question state, as far as circumstances will permit, (A) the nature of his intended duties and responsibilities?"—A. (A) "He is secretary of the — Literary Institution, of which I am treasurer." (c) "The checks which will be used to secure accuracy in his accounts, and when and how often they will be balanced, and closed?"—A. (c) "Examined by finance committee every fortnight." (D) "The salary or emolument, and when it will be paid to him, and how and when it will be paid?"—A. (D) "£80 a year at present."

HELD—that the statement that the accounts of W. would be examined once a fortnight by the finance committee of the institution did not amount to a warranty but was a mere representation of the intention of the plaintiff; and, consequently, that he was entitled to recover in respect of a loss arising from the want of integrity of W., although such loss was occasioned by the neglect to examine the accounts in the manner specified.

Note.—In the judgments this case is treated, somewhat strangely,

as a perfectly clear one, and no insurance cases are referred to in support. It will be observed that the question was put to and answered by the employer, not the proposer. Contrast *Haworth v. Sickness and Accident* [1749a], where the employer was the assured.

1748a.—Regina v. The National Insurance Company (1887) 13 V. L. R. 914 (Victoria).

A clerk in the public service applied to the office for a fidelity guarantee policy. The office, before granting the policy, inquired of the head of the employee's department (1) how frequently accounts would have to be rendered, (2) what checks there would be upon the accounts. Answers: accounts would be checked by an officer of the department monthly and by the Audit Commissioners.

The employee embezzled. In an action by the Crown:

HELD—that although it appeared that the accounts had not been checked at all and although the loss had been contributed to by the absence of checks the office was liable, the answers above-mentioned not being warranties but mere representations of intention.

Notes.—*Benham v. United Guarantee* [1748] was relied upon.

1749.—Towle v. National Guardian Insurance Society (1861), 30 L. J. Ch. 900; 7 Jur. N. S. 1009; 5 L. T. 193; 10 W. R. 49.

A. was a collector of taxes, and he effected a guarantee policy with an insurance society. Before the society granted the policy, answers were required not only from the applicant but also from his intended employer. The employer was the commissioner of taxes, but instead of resorting to them the society accepted the answer of the overseer of taxes; they put certain questions to him touching the amount of money at any one time to come to his hands, and to be retained by him. In reply to these questions, he stated that "he was to collect and account for the sums collected by him; that the amount of money which he was to receive, and retain in his hands, was from £100 to £200, and not longer than a week; that his accounts would be checked weekly by the surveyor of taxes; that the balance of each account would, on the occasion of such check, be paid over; and that such balances would be occasionally tested by his employers." The whole amount of taxes receivable by him in a year was £9,000, and it was by dividing that sum by fifty-two that he was enabled to answer as he had done as to the £100 and £200. He absconded, in default to the amount of £654. On a bill by his sureties against the society, for payment to them on the guarantee policy of the £654:

HELD (by one of the Vice-Chancellors)—(1) that the statement of the surveyor of taxes did not amount to a warranty, inasmuch as it was a representation by a third person, who was not a party to the contract, as to the course intended to be pursued by another person.

(2) That the representation in question, being not to a past or existing state of things, but to the future acts of other persons, had no application to the case of a guarantee policy, and

as the representation was made fairly and honestly, and was substantially correct, it did not vitiate the policy, but upon appeal :

HELD—that the policy was void *ab initio*, being founded on a misrepresentation.

Notes.—In the judgments on appeal Turner, L.J., distinguishes *Benham's Case* [1748] and *Anderson's Case* [431], on the ground that those cases depend upon the terms of the policy.

1749a.—Haworth v. Sickness and Accident Assurance Association, Ltd. (1891), 18 R. 563 (Scotland).

A fidelity guarantee policy set forth that the employer had delivered a proposal to the office containing certain statements and a declaration setting forth, *inter alia*, “ the checks to be kept upon [the employee's] accounts, and has consented that such proposal and declaration, and each of the statements therein referred to or contained, shall form the basis of the contract . . . and this agreement is granted on the condition that the business of the employer shall be conducted in every particular in accordance with the said proposal, statements, and declaration, except with the consent of the association in writing.”

The proposal contained the following questions and answers : “ (Q.) How often will the employer balance and settle the applicant's accounts ? (A.) Monthly. (Q.) Specify the checks which the employer will use to secure accuracy in the applicant's accounts. (A.) Statements sent to customers by employer. (Q.) In particular, will the employer send accounts direct to customers, and if so, how often ? (A.) Every three months.”

The employee embezzled. In an action on the policy it was proved that monthly settlements were not made and the employer did not send the accounts to the customer direct but to the employee (a traveller) for collection.

HELD—that the employer had not complied with the conditions and the office was not liable.

1750.—Byrne v. Murzio (1881), 8 L. R. Ir. 396 (Ireland).

This action was brought upon a policy of insurance guaranteeing the due performance by a collector of rates of his duties as collector. The guarantors pleaded that the contract was entered into by them on the faith of a certain statement and representation made by the plaintiff and the person employed, that there had been no balance outstanding from the latter, nor any irregularity in his accounts, and that such representations were untrue. No fraud was alleged and no circumstances pleaded which could raise a fraud.

HELD (on demurrer)—plea bad and therefore the insurers were liable.

The guarantors, by their agreement, contracted to guarantee the plaintiff against loss sustained from any act of fraud or dishonesty by the rate collector or from failure to pay in sums collected or to account, “ provided that [the plaintiff] should, within ten days after the discovery by him of any fraud or dishonesty of the ‘ said person

employed,' and of any matter in respect of which any claim may be intended to be made, give notice in writing at the office of the society, as far as the case will admit, of all the particulars thereof; and after any such discovery, the guarantee herein contained shall, as to loss by any act of fraud or dishonesty subsequent thereto, be at an end."

HELD—notice need only be given of such fraud or dishonesty as would form a foundation of a claim under the guarantee and imposed no obligation to give notice of dishonesty which had occurred before the guarantee was entered into.

Under 12 & 13 Vict. c. 91, the power of dismissing rate collectors is vested in the Lord Lieutenant, but by regulations of the Privy Council, made under the Act, the Collector-General is empowered to *suspend* any collector who in his opinion has been guilty of neglect or violation of duty.

HELD—the omission of the Collector-General to suspend the collector, after knowledge of fraud and dishonesty on his part during his service and employment, was not a defence to an action on the guarantee.

Notes.—*Phillips v. Foxall* [1753] was declared inapplicable to fidelity guarantee where there was no power to *dismiss* vested in the employer but only a power to suspend. *Sanderson v. Aston*, L. R. 8 Exch. 73, was distinguished on similar grounds. *Lawder v. Lawder*, Ir. R. 7 C. L. 57, was compared. See also the similar case of *The Guardians of the Westport Union v. O'Malley*, 8 L. R. Ir. 412, note (1). The first part of the above decision turns largely on pleading.

1751.—*Elgin Loan and Savings Co. v. London Guarantee and Accident Co.* (1906). On appeal, 11 Ont. L. R. 330; 7 O. W. R. 109 (Ontario).

In an action on a fidelity guarantee policy :

HELD—(1) where the proposal is referred to in the policy it is incorporated therewith and becomes part of the contract between the parties.

(2) If the proposal contains an incorrect statement as to the checks to be kept upon the employee's accounts (he was the manager of the assured company), the policy is avoided even though the person making the statement does not appear to have been expressly authorised to make it by the assured company.

Notes.—On the first point *Hay v. Employers' Liability Assurance Corporation* [1752] was followed.

1752.—*Hay v. Employers' Liability Assurance Corporation* (1905), 6 O. W. R. 459 (Ontario).

In an action upon a fidelity guarantee policy :

HELD—(1) where the proposal is referred to in the policy it is incorporated therewith and becomes part of the contract between the parties.

(2) Where the employee had not been employed by the assured previous to the insurance statements as to modes of business and the various checks to detect dishonesty made in the application cannot be said to be untrue when made, but are merely in the nature of a declaration of intention.

(3) If the nature of the employment is changed the office can avoid.

II. Increase of Risk.

1753.—Phillips v. Foxall (1872), L. R. 7 Q. B. 666.

On a continuing guarantee for the honesty of a servant, if the master discovers that the servant has been guilty of dishonesty in the course of the service, and instead of dismissing the servant, he chooses to continue him in his employ without the knowledge and consent of the surety, express or implied, he cannot afterwards have recourse to the surety to make good any loss which may arise from the dishonesty of the servant during the subsequent service.

Notes.—In the judgment of Cockburn, C.J., Lush and Quain, JJ., *Smith v. Bank of Scotland*, 1 Dow, 272 [1747], and *Railton v. Mathews*, 10 Cl. & F. 934, at p. 943, are relied upon and treated as conclusive on the point that if the dishonesty, etc., had arisen *before* the contract of guarantee had been entered into the guarantor would be discharged, and *Hamilton v. Watson*, 12 Cl. & F. 109, is distinguished on the facts. *North British Insurance Co. v. Lloyd*, 10 Ex. 573 [366], is referred to as establishing the principle that in contracts of suretyship, unlike marine and life insurances, innocent non-disclosure does not avoid (but observe the *North British Case* was concerned with suretyship, and not guarantee insurance). The other cases referred to, viz., *Lee v. Jones*, 17 C. B. N. S. 482; *Rees v. Berrington*, 2 Ves. 540; *Peel v. Taltock*, 1 B. & P. 419; *Shepherd v. Beecher*, 2 P. Wms. 288; *Mayhew v. Crickett*, 2 Swan. 185; *Smith v. Winter*, 4 M. & W. 454; *Burgess v. Eve*, L. R. 13 Eq. 450; *Bailey v. Edwards*, 4 B. & S. 770; *Pooley v. Harradine*, 7 E. & B. 431, are surety cases. As to these and other cases on suretyship reference may be made to the notes to *Rees v. Berrington*, Wh. & Tud. L. C. in Equity. *Phillips v. Foxall* was distinguished in the Irish case of *Lawder v. Lawder*, 1 R. 7 C. L. 57, and declared not to apply where the bond is given to a public officer, such as a County Treasurer, in his official capacity. And see *Byrne v. Muzio* [1750].

1754.—Confederation Life Association v. Brown (1901), 35 N. S. R. 94.

Where the person guaranteed knows of a dereliction of duty on the part of the servant whose fidelity is guaranteed and fails to give notice to the guarantor the guarantor is discharged.

Note.—This is not an insurance case, but arose in an ordinary contract of guarantee.

1755.—Sanderson v. Aston (1873), L. R. 8 Ex. 73.

Action on a bond guaranteeing the due payment over of moneys received for his employer by one J. It appeared that before the

defaults sued for J. had committed other defaults of the same kind and that the plaintiff, his employer, had continued to employ him without giving notice to the defendant. The original agreement of service provided that it was terminable on one month's notice; this was subsequently altered to three months.

HELD—surety discharged by the plaintiff continuing to employ J. after default made and without giving the defendant notice, but as to the second point it was not material to the risk that the length of notice required to terminate the service had been lengthened.

Notes.—On the main point this case follows *Phillips v. Foxall* [1753].

1756.—The Wembley Urban District Council v. The Poor Law, etc. Officers' Mutual Guarantee Association, Ltd. (1901), 17 T. L. R. 516.

By a fidelity guarantee policy the defendant office guaranteed the faithful discharge of his duties by a clerk in the employ of the plaintiffs. After the policy was issued, the clerk was entrusted with the duty of paying certain employees of the plaintiffs. In connection with these payments the clerk failed to account.

HELD—that the loss was not within the risk. Further, the defendants were not liable because there was increase of risk, or in other words, the additional duties not being within the original appointment the guarantor was discharged.

1757.—Société des Artisans Canadiens-Français v. Trudel (1904), Q. R. 26 S. C. 118 (Quebec).

A surety is discharged where the employment of the person whose fidelity is guaranteed is altered so that the risk may be enhanced.

1758.—Skillet v. Fletcher (1867), L. R. 2 C. P. 469.

In an action on a bond conditioned for the due performance by A. of his duties as collector of the poor rate and of sewers, etc., it appeared that subsequently to the giving of the bond he had been appointed collector of the main drainage rate.

HELD—bond not avoided. Though the alteration of the risk or of the duties in the office guaranteed may avoid the bond the addition of a new office not covered by the bond cannot do so.

1759.—The North Western Railway Co. v. Whinray (1854), 10 Ex. 77.

W. entered into a bond guaranteeing the fidelity of L., who was engaged by the plaintiffs, to sell coal at a salary of £100 *per annum*. L.'s fidelity was guaranteed as "such coal agent." The plaintiffs had no power to sell coal; L.'s salary was later altered from a fixed salary to one on commission.

HELD—that W. was not liable after the change in the remuneration, but that the mere fact that the plaintiff had no power to sell coal did not make the bond invalid.

1760.—Oswald v. Mayor of Berwick (1856), 5 H. L. Cas. 856; 3 E. & B. 653; 1 E. & B. 295.

Where there is a bond for suretyship of a public officer, and, by the act of the parties or by Act of Parliament, the nature of the office is so changed that the duties are materially altered, so as to affect the risk the sureties have undertaken, the bond is avoided.

Notes.—This case was followed in *Pybus v. Gibb* (1856), 6 E. & B. 902.

1761.—McDonald v. London Guarantee and Accident Insurance Co. (1911), 19 O. W. R. 807; 2 O. W. N. 1455 (Ontario).

The agreement with a guarantee insurance company stipulated that the bookkeeper whose fidelity was guaranteed should not have power to draw cheques on his employer's account. The employer drew cheques in blank for the bookkeeper to fill in.

HELD—that in effect the stipulation or condition had been broken and that the employer was unable to recover on the fidelity bond.

1761a.—Dougharty v. The London Guarantee and Accident Co., Ltd. (1880), 6 V. L. R. (Law) 376 (Victoria).

In the case of fidelity guarantee insurance expressly based upon representations amounting to a promise as to the way in which the dealing of the employee will be checked and supervised, any alteration of such course of business by the insured (the employer) without the consent of the office, vitiates the guaranty. But if the failure is merely a failure on the part of the servants of the insured to carry out his instructions in this respect, it will not so vitiate the guaranty.

An undertaking to use due diligence in prosecuting the person whose fidelity is guaranteed does not impose upon the insured an obligation to incur the expense of bringing back the defaulter, when he has escaped from, and has been captured out of, the jurisdiction of the court.

III. *Risk.*

(a) *Commencement of Risk.*

1762.—Allis Chalmers Co. v. Fidelity and Deposit Co. of Maryland (1913), 29 T. L. R. 506.

The plaintiffs, who carried on business in various towns, including Paris, requested the defendants to issue a bond guaranteeing the plaintiffs against loss through the dishonesty of L., their Paris manager. On the application from the plaintiffs, in answer to the question "From what date is it [the bond] to be in force and for what amount?" answered thus: "From issuance, £1,000." On March 7th, 1912, the rate of a premium was arranged, and on March 8th the bond was drawn up and executed at the defendants' London office. It recited that in consideration of the premium paid to the defendants they agreed to reimburse the plaintiffs for any

loss they might sustain by the larceny or embezzlement of L. "during the period from March 8th, 1912, to March 7th, 1913." The premium had not then been paid, nor by the terms of the bond was its payment a condition precedent to liability upon the bond. The bond was forwarded the same day to the defendants' French agents, who on March 9th sent it to the plaintiffs' Paris office; it was, however, returned to the agents with a request that they should deliver it at the plaintiffs' London office, and this was done on March 18th with a request for a cheque for the premium. The plaintiffs' London manager was then absent, and it was finally arranged that the matter should stand over till his return. On April 13th L. left his office in Paris, and by April 18th the plaintiffs were in a state of suspicion about him, although not sure that his absence was incapable of a satisfactory explanation. On that day the plaintiffs' London manager returned, and on being informed of the facts paid the premium to the defendants and obtained the bond from them. A few days later the plaintiffs discovered defalcations by L., and made a claim on the bond, but the defendants repudiated liability on the ground that the contract was not complete till April 18th, and that there had been concealment of material facts.

HELD—that the plaintiffs were entitled to recover, as the date of the "issuance" of the bond was by March 18th at latest, a date when it was not suggested that L.'s misconduct had begun.

(b) *Risk covered.*

1763.—Cosford Union and Hitcham Parish Council v. Poor Law and Local Government Officers' Mutual Guarantee Association, Ltd. (1910), 103 L. T. 463; 75 J. P. 30; 8 L. G. R. 995.

A. was appointed assistant overseer of the parish of H. By virtue of his appointment he became clerk to the parish council of H. The defendant office guaranteed his fidelity of assistant overseer.

HELD—that defalcations of A. in relation to the parish council accounts were not within the risk, the accounts falling within his duties as parish clerk and not within his duties as assistant overseer.

1764.—Debenhams, Ltd. v. Excess Insurance Co., Ltd. (1911), 28 T. L. R. 505.

By a fidelity policy the defendants undertook to reimburse the assured for loss resulting from embezzlement upon the part of an employee.

HELD—that the word "embezzlement" in the policy must be construed as it would be when used in an indictment.

1765.—London Guarantee and Accident Co. v. The Hochelaga Bank (1893), 3 B. R. 25 (Quebec).

The cashier of a bank removed bundles of notes from the bank premises to his residence, for the purpose of signing them, but it appeared that he brought them all back, and subsequently, in his office in the bank, he put a number of \$5 notes in the bundles instead of \$10 notes, and thus defrauded the bank of \$8,140.

HELD—(1) In entrusting the notes to the cashier to be signed there was no negligence on the part of the bank involving a violation of the terms of the contract, and the loss was one caused by “fraud and dishonesty amounting to embezzlement” on the part of the employee, and came under the guarantee given by the policy.

The same employee, shortly before his flight from the country, caused his own cheques, to the amount of \$15,574, to be certified by the ledger-keeper of the bank, although he, the cashier, had no funds there.

HELD—(2) this act, although, technically speaking, not constituting the crime of embezzlement, was “fraud and dishonesty amounting to embezzlement” on the part of the cashier, and came under the guarantee of the policy. These words in the policy have to be taken in their ordinary and vulgar sense, as otherwise the words “fraud and dishonesty” would be without effect.

(3) The fact that the bank recovered a large part of the money taken did not affect its right to claim under the policy, there being a balance of total loss remaining which exceeded the amount of the policy.

(4) The claim of the bank was not affected by its communications with the employee after his flight, such communications not having had any injurious effect as regards the guarantee company.

On May 30th the cashier did not appear at his office, and a number of the cheques certified by the ledger keeper, as above-mentioned, were presented and paid, although he had no amount to his credit to check against. On the following day the bank gave notice of the defalcation to the local agent of the guarantee company.

HELD (5)—the notice was given within a reasonable time, and the bank was not guilty of negligence.

1766.—Commercial Mutual Building Society v. London Guarantee and Accident Co. (1891), M. L. R. 7 Q. B. 307; 21 R. L. 275 (Quebec).

By a condition of a guarantee policy it was provided that the company should make good to the employer such pecuniary loss as might be sustained by him by reason of the dishonesty of the employee “committed and discovered during the continuance of this agreement, and within three months from the death, dismissal or retirement of the employee.” The policy lapsed, and a defalcation was discovered four months afterwards.

HELD (by the Superior Court)—that the company was not liable in respect of such defalcation, inasmuch as it was not discovered as well as committed during the continuance of the agreement.

1766a.—Fanning v. The London Guarantee and Accident Co., Ltd. (1884), 10 V. L. R. (Law) 9 (Victoria).

A fidelity guarantee policy was subject to conditions that, on the discovery of any fraud, immediate notice should be given, that a claim in writing should be made within three months of discovery; that the policy should only cover losses incurred within twelve

months before notice of claim under it. The policy was terminated by the office at the end of the first year. A fraud was committed within, but not discovered until after, the expiration of the year.

HELD—that under this particular policy for the office to be liable the loss must be committed and discovered within the year and that consequently the office was not liable.

1767.—European Insurance Society v. Bank of Toronto (1875), 7 R. L. 57, P. C. (Que. App.).

The Bank of Toronto obtained a policy of assurance from the European Assurance Society, insuring them against such loss as might be occasioned to the bank by the want of integrity, honesty or fidelity, or by the negligence, defaults, or irregularities of Alex Munro, their agent at Montreal. Munro subsequently allowed Nichols and Robinson to overdraw their account to the amount of \$47,844, knowing that they were unable to pay that sum.

HELD—that the European Assurance Society was liable.

1768.—Citizens Insurance Co. v. Grand Trunk Railway Co. (1880), 25 L. C. J. 163 ; 3 L. N. 311 (Quebec).

A guarantor, who undertakes to make good any loss which by law the employee would be bound to make good, is liable where the loss is caused by the *negligence* of an employee.

1769.—Banque Nationale v. Lespérance (1881), 4 L. N. 147 (Quebec).

The teller of a bank indorsed on a parcel of bank notes the amount which it was supposed to contain. It was subsequently discovered that the parcel was \$3,600 short, and it was ascertained that a deficiency of the same amount existed in the teller's accounts and had been during several years skilfully covered up and concealed from the authorities of the bank who had made the usual inspections.

HELD—that a guarantee insurance company which had guaranteed the fidelity of the teller was liable for the deficiency, but only to the extent which occurred after the contract was made.

1770.—Protestant Board of School Commissioners v. Guarantee Co. of North America (1889), 31 L. C. J. 254 (Quebec).

In August, 1882, the defendants issued a policy of insurance by which they undertook to indemnify the plaintiffs for any loss they might sustain through fraud or dishonesty on the part of E., the cashier or clerk of the plaintiffs, which policy was renewed from year to year. In September, 1885, E. received certain sums of money for the plaintiffs, amounting to \$2,085, which money disappeared from the safe in plaintiffs' office ; E. was tried for larceny of the amount in question, but was acquitted. Plaintiffs' action was to recover the amount of the guarantee policy from defendants.

HELD—that E., having received the said money in the course of his duties as cashier or clerk of the plaintiffs, and failed to account for the same, and defendants not having proved that this failure was

due to a fortuitous event or *force majeure*, the defendants were liable notwithstanding the acquittal of E.

IV. *Extent of Office's Liability.*

1771.—The Crown Bank v. The London Guarantee and Accident Co. (1908), 17 Ont. L. R. 93 (Ontario).

The defendant office gave a bond guaranteeing (to the extent of \$5,000 in the case of a paying teller, and \$6,000 in the case of an accountant in the plaintiff bank) against "all and any pecuniary loss sustained by [the plaintiffs] directly occasioned by dishonesty or negligence, or through disobedience of direct and positive instructions, given by an authorised official on the part of such employee in connection with his duties in the bank's service." By a clause the defendants were exempted from liability, if act or omission occasioning loss was done or not done in pursuance of an order of a superior. Another condition required the plaintiffs when required by the defendants, and at their cost, to assist them in every way in bringing to justice any employee, etc., and procuring the re-imbursment, etc.

On a Saturday the teller embezzled money and absconded from Canada. The money was properly in his custody until the close of the day, when it was his duty to deposit it in the vaults, having first submitted his cash to examination by the accountant. On the day in question, the accountant certified to the correctness of the teller's statement in which the stolen money was included. The money was first found to be missing on the Monday following. Without communicating with the office the bank took active steps, and finally succeeded in apprehending the teller. They expended nearly \$10,000 in so doing.

HELD—(1) that the loss of the money was "directly occasioned" not merely by the dishonesty of the teller, but also by the negligence of the accountant, and that the office was liable under its bond in respect of both.

(2) That the contract between the parties was one of indemnity, and the plaintiffs were therefore entitled to deduct all such reasonable expenses as were incurred by them in recovering the money.

Notes.—The question of subrogation is also touched upon in judgment. The following insurance cases are referred to: *Dane v. Mortgage Insurance Corporation* [1787]; *Darrell v. Tibbitts* [1441]; *Castellain v. Preston* [1440]; *National Fire Insurance Co. v. McLaren* [1450]; *Hatch-Mansfield v. Weingott* [1774]; *Assicurazioni v. Empress, etc.*, [1907] 2 K. B. 814 [1462]. The office is regarded as entitled to all moneys recovered after, but only after, the assured has been fully indemnified, and this right is based entirely upon the principle of subrogation.

1772.—The Fifth Liverpool Starr-Bowkett Building Society v. The Travellers Accident Insurance Co., Ltd. (1893), 9 T. L. R. 221.

A fidelity guarantee policy provided for the deduction from the amount otherwise payable under the policy of all moneys due by the

plaintiff company (who were guaranteed against loss) to the person whose fidelity was guaranteed. The plaintiff company was in liquidation. The loss was greater than the sum assured.

HELD—that moneys due must be deducted from the loss and not from the sum assured. Since the plaintiff company was in liquidation, it was doubtful how much was due to the person whose fidelity was guaranteed. The office was ordered to pay the sum assured to the plaintiffs, and the plaintiffs were ordered to hold any money due to the person whose fidelity was guaranteed for the benefit of the office as soon as it was ascertained if it reduced the loss below the sum assured.

1773.—Kenney v. Employers' Liability Assurance Corporation, [1901] 1 Ir. R. 301.

The National Bank were mortgagees of A.'s estate. Under their statutory powers they appointed B. receiver, and the defendants entered into a bond with the National Bank guaranteeing that B. should "in all things diligently and faithfully perform and discharge all and every his duties as such receiver without any wilful default."

B. made default. The bank then obtained payment off of the mortgage debt. The result was that the loss fell on the mortgagor. He joined in with the bank in an action on the bond. The Master of the Rolls (Ireland) dismissed the claim on the grounds that the bank has suffered no loss and the mortgagor was not a party to the contract of guarantee; but on appeal:

HELD (Walker, L.J., *diss.*)—that A. and the bank were entitled to sue on the bond for the amount of the default.

1774.—Hatch, Mansfield & Co. v. Weingott (1906), 22 T. L. R. 366.

The defendant guaranteed the honesty of a servant of the plaintiffs up to £250. The servant, while in the plaintiff's employment, acting in concert with a confederate, from time to time stole a quantity of the plaintiffs' cigars of the value of £269. The servant and the confederate were prosecuted by the plaintiffs and convicted, and an order was made for the restitution of the stolen property. Under the order £114 worth of the cigars were recovered. The net costs incurred by the plaintiffs, after giving credit for the amount allowed by the county, in tracing the guilty parties and prosecuting them amounted to £98.

HELD—that, in the circumstances, it was a reasonable course to prosecute, so as to recover the stolen cigars, and that, therefore, the costs incurred by the plaintiffs should be deducted from the value of the cigars recovered before giving the defendant credit for it under his guarantee.

1775.—American Surety Co. of New York v. Wrightson (1910), 27 T. L. R. 91.

The plaintiffs, an American insurance company, issued a policy by which they covenanted to pay an American bank for any loss or damage caused by dishonesty of an employee, the liability for any

individual employee not to be greater than the amount set against his name in a schedule. Among the persons named in the schedule was K., who was insured up to \$2,500. The bank also took out a policy at Lloyd's for £40,000, and by this policy the underwriters were to be liable for loss sustained by the loss or destruction on the assured's premises of bonds, banknotes, and other documents, owing to fire or burglary, and also for loss through the dishonesty of clerks or other employees. During the currency of the two policies K. made defalcations to the extent of \$2,680. The bank claimed from the plaintiffs the full amount of the insurance—\$2,500—leaving a balance not covered by that policy of \$180. The bank then claimed and were paid the \$180 on the Lloyd's policy. In an action by the plaintiffs against the defendant, one of the underwriters on the Lloyd's policy, claiming contribution in respect of the loss :

HELD—(1) that English law, and not American law, applied.

(2) That the defendant was liable on the basis that the underwriters should bear a proportion of the whole loss of \$2,680 in the ratio of 2,680 to 2,500.

1776.—City of London Fire v. Citizens Insurance Co. (1887), 13 Ont. R. 713 (Ontario).

The C. and D. companies by independent contracts guaranteed to the plaintiffs the good conduct in office of their city chamberlain B. Subsequently B. was guilty of misconduct within the guarantees. The guarantee of the C. company provided that as against every person then being or thereafter becoming surety for the said B., the C. company should have the right of rateable contribution, and all other the rights and remedies, both legal and equitable, of co-sureties. The guarantee of the D. company included and was more extensive in its scope than the guarantee of the C. company. The C. company, upon being sued by the plaintiffs, set up as a defence that the plaintiffs had discharged D. from liability under his policy, and that this also discharged them.

HELD—(1) that even if the plaintiffs had so discharged D., this operated only to release the C. company to the extent to which they would have had a right of contribution from D., and that they would have been discharged to this extent as a matter of equity, independently of their contract.

(2) That the C. and D. companies could not be considered in any sense joint contractors or joint sureties.

V. *Duties of Assured.*

(a) *To Prosecute, etc.*

1777.—London Guarantee and Accident Co. v. Fearnley (1880), 5 App. Cas. 911 ; 43 L. T. 390 ; 28 W. R. 893 ; 45 J. P. 4—H. L.

By an agreement and policy of insurance, the defendants agreed to reimburse the plaintiff any pecuniary loss, to the amount of £1,000, which he might sustain by reason of any fraud or dishonesty of A. in connection with his employment by the plaintiff, as should

amount to embezzlement, and should be committed and discovered during the continuance of the policy. The policy provided (among other things) "that the employer shall, if and when required by the company, but at the expense of the company, if a conviction be obtained, use all diligence in prosecuting the employed to conviction for any fraud or dishonesty as aforesaid, which he shall have committed, and in consequence of which a claim shall have been made under this policy, and shall, at the company's expense, give all information and assistance to enable the company to sue for and obtain reimbursement by the employed, or by his estate, of any money which the company shall have become so liable to pay." In an action on the policy the office pleaded that they had required the assured to prosecute but that he had not done so.

HELD (by Lords Blackburn and Watson (Lord Selborne, C., *diss.*))—that the prosecution of A. for embezzlement was a condition precedent to the plaintiff's right of action upon the policy.

Notes.—*Worsley v. Wood* [831] is followed by Lords Blackburn and Watson. Lord Watson quotes Lord Blackburn's expression used in judgment in *Bettini v. Gye*, 1 Q. B. D. 183, at p. 187, "Parties may think some matter, apparently of very trivial importance, essential; and if they sufficiently express an intention to make the literal fulfilment of such a thing a condition precedent, it will be one."

1778.—*Les Commissaires d'École pour la Municipalité de la paroisse Saint Edouard v. The Employers' Liability Assurance Corporation* (1907), 16 B. R. 402 (Quebec).

The insured, under a contract of fidelity insurance, is bound to superintend rigorously the conduct of the employee who is the subject of it and to see that he conforms to all legal requirements concerning the keeping and auditing of his accounts, and in case of embezzlement, to take proceedings with all due diligence (civil as well as criminal).

1779.—*La Cannadienne Comp. d'Assurance sur la vie v. The London Guarantee and Accident Co.* (1900), 9 B. R. 183 (Quebec).

The appellant company effected an insurance with the respondent company for the fidelity of certain of appellant's employees, amongst whom was one Boisvert. An interim receipt for the premium was given in which it was stated that it was issued "subject to the conditions of the company's general form now in use for the class of risk." Before the expiration of the three months allowed for the issue of the policy under the conditions of the interim receipt, there was a shortage in Boisvert's accounts for which the appellant made a claim under the contract of insurance. The respondent pleaded that by one of the conditions of its ordinary policy, the insured was obliged to prosecute the defaulting employee to conviction with all diligence, and that as this condition had not been complied with by the plaintiff, appellant, it could not recover.

HELD—that the conditions of the respondents' ordinary form of policy for this class of risk must be included and read into the text

and meaning of the interim receipt, and that the acceptance of the receipt in this form must be held to indicate either that appellant knew what these particular conditions were, or had such a knowledge of the general conditions in use by guarantee companies, that it was willing to be bound by them.

It was not an unreasonable condition that the employer should, as a condition precedent, use all possible diligence to prosecute the defaulting employee to conviction.

(b) *To give Notice, etc.*

1780.—Ward v. Law Property Assurance and Trust Society (1856),
4 W. R. 605.

Where in a guarantee policy against criminal misconduct on the part of an employee there is a condition that the insurer is to give notice within six days of any liability being incurred, or the policy to be void :

HELD—that this means notice of any criminal misconduct whereby it is clear that any liability has been incurred ; and therefore that the plaintiff, on receipt of evidence that the person mentioned in the policy has been guilty of embezzlement, was not bound to give notice until he has ascertained that criminal liability had been incurred.

1781.—Molson's Bank v. Guarantee Co. of North America (1886),
M. L. R. 4 S. C. 376 (Quebec).

A condition in a guarantee bond required the employer to give notice immediately to the guarantor, of any criminal offence of the employee entailing loss for which a claim was liable to be made under the bond, and the employer, although aware of a defalcation on the 25th, did not give notice thereof to the guarantor until the 27th, after the employee had fled the country.

HELD—that the bond was forfeited.

1782.—The Harbour Commissioners of Montreal v. The Guarantee Co. of North America (1893), 22 Can. S. C. 542 (Que. App.).

A policy was granted by the defendants to the plaintiffs guaranteeing the honesty of W. Two (*inter alia*) conditions were attached : (1) that the answers in the application contained a true statement of the manner in which the business was conducted and accounts kept, and that they would be so kept ; (2) that the employers should *immediately* upon its becoming known to them give notice to the office if W. was guilty of any criminal offence likely to result in a loss covered by the policy.

The evidence showed that no proper supervision had been exercised over W.'s books. The office was not notified until a week after the employers knew of the defalcation of W.

HELD—the employers had not exercised the stipulated supervision over W., and had not given *immediate* notice of the defalcation, consequently there was a breach of a condition and they were not entitled to recover.

PART XXIII.

GUARANTEE INSURANCE.

GUARANTEE insurance is subject to the rules relating to contracts of insurance rather than to those relating to contracts of guarantee. Thus in guarantee insurance the office relies for its knowledge of the risk upon the assured (see *In re Denton's Estate* [1783]), and consequently it is probable that guarantee insurance is a contract *uberrima fidei*. But, of course, concealment or non-disclosure must be material to avoid (*Seaton v. Burnand* [1795]). Again, the contract of guarantee insurance is not destroyed by the disappearance of the debt guaranteed (*Shaw v. Royce, Ltd.* [1784]); and the doctrine of subrogation applies (*Parr's Bank v. Albert Mines Syndicate* [1786]); and the contract is one of indemnity (*MacVicar and Another v. Poland* [1796]; *Laird v. The Securities Insurance* [1788]); but this may be limited if the contract covers a particular risk only (*In re Law Guarantee Trust and Accident Society* (No. 1) [1792]). Again there may be a re-insurance of the risk, in which case the re-insurers are discharged if the risk is materially increased (*The Law Guarantee Trust and Accident v. Munich Reinsurance* [1794]). If A. takes out a debenture-guarantee policy with B., and B. re-insures a part of the risk with C., and if both A. and B. wind-up, moneys recovered by B. from C. must be held for the benefit of A.'s debenture holders and not for the benefit of B.'s general creditors (*In re Law Guarantee Trust and Accident Society* (No. 2) [1793]). For cases where it has been judicially considered whether the contract is one of guarantee or guarantee insurance, see *In re Denton's Estate* [1783]; *Shaw v. Royce, Ltd.* [1784]; *Finlay v. Mexican Investment Corporation* [1785]; *Parr's Bank v. Albert Mines Syndicate* [1786].

As to deposit guarantee. For what amounts to default in payment on the part of a bank in the case of deposit guarantee, see *Dane v. Mortgage Insurance* [1787]; *Laird v. Securities Insurance* [1788]; *Young v. The Trustee, Assets, and Investment Insurance* [1789]. The office may be liable to pay the policy moneys to the assured although such payment is expressed to be due only when the "final dividend . . . is declared" if it appears that there is no practical possibility of the bank declaring any further dividend (*Murdock v. Heath* [1790]).

As to mortgage guarantee. For a case where a policy guaranteeing a mortgage debt was a contract of guarantee and not of insurance, see *In re Denton's Estate* [1783]. Even though the policy is conditioned to become void if the interest of the assured in the mortgage is assigned without notice the assured may still assign with notice, and the office may not withhold their consent (*Birkbeck Permanent Benefit Building Society v. Licensees' Insurance, etc.* [1791]). A policy guaranteeing the mortgagee principal and interest does not

cover costs of proof in the winding-up of the office (*In re Law Guarantee Trust and Accident Society* (No. 1) [1792]).

As to debenture guarantee. See *Shaw v. Royce, Ltd.* [1784]; *Finlay v. Mexican Investment Corporation* [1785] (as to whether the contract is one of insurance or guarantee); *In re Law Guarantee, Trust and Accident Society* (No. 2) [1793]; *The Law Guarantee, Trust and Accident Society v. Munich Re-insurance* [1794] (as to re-insurance of the risk).

As to solvency guarantee. If the office make enquiries as to the circumstances of the person whose solvency is guaranteed, and are satisfied and make no further enquiries, it is possible (though by no means clear) that the assured is relieved from disclosing further facts. It will be observed that the judgment in *Seaton v. Burnand* [1795] is very narrow and turns on the facts. It is probably sufficient for the risk to attach to show that the person insured cannot in fact get payment from the person whose solvency is guaranteed owing to that person's generally embarrassed state (*MacVicar and Another v. Poland* [1796]). If five underwriters purport to subscribe the policy, and the name of one is in fact signed without his authority, that does not discharge the other four (*Anglo-Californian Bank v. London and Provincial Marine* [1797]).

As to guarantee against loss from bad debts. See *Solvency Mutual v. York* [1798]; *In re Solvency Mutual Society* [1799]; *Solvency Mutual v. Froane* [1800] as to renewal of the contract under the solvency mutual policies. In a case of a mutual policy conditioned to be avoided if the member insured ceased to trade, the member insured was a firm and a partner retired, and it was held that the policy was avoided (*Solvency Mutual Guarantee v. Freeman* [1801]).

For the cases where the security of a guarantee society may be taken by a receiver, etc., see *Carpenter v. Solicitor to the Treasury* [1802]; *Colemore v. North* [1803]; *Aldrick v. British Griffin, etc., Co.* [1804]; *Harris v. Sleep* [1805].

The cases are divided up as follows :—

- I. Generally.
- II. Deposit Guarantee.
- III. Mortgage Guarantee.
- IV. Debenture Guarantee.
- V. Solvency Guarantee.
- VI. Guarantee against Loss from Bad Debts.
- VII. Miscellaneous.

I. *Generally.***1783.—In re Denton's Estate, Licenses Insurance Corporation and Guarantee Fund, Ltd. v. Denton, [1904] 2 Ch. 178.**

In an action where the main point in dispute was whether a policy guaranteeing a mortgage debt was a contract of insurance or of guarantee, it was held on the facts and the construction of the mortgage, proposal and policy, that it was a contract of guarantee (Vaughan Williams, L.J., *dub.*).

Per Vaughan Williams, L.J. (at p. 188): "I would refer to the judgment of Romer, L.J., in *Seaton v. Heath*, [1899] 1 Q. B., at p. 792 [1795], which on this point is unaffected by the reversal in the House of Lords of the judgment in the Court of Appeal. Romer, L.J., in discussing the difference in substance between these two classes of contract, says: 'The difference between these two classes of contract does not depend upon any essential difference between the word "insurance," and the word "guarantee." There is no magic in the use of those words. The words, to a great extent, have the same meaning and effect; and many contracts, like the one in the case now before us, may with equal propriety be called contracts of insurance or contracts of guarantee.'

"The distinction in substance, in cases in which the loss insured against is simply the event of the non-payment of a debt, seems to be, as I read the judgment of Romer, L.J., between contracts in which the person desiring to be insured has means of knowledge as to the risk and the insurer has not the same means, and those cases in which the insurer has the same means."

1784.—Shaw v. Royce, Ltd., [1911] 1 Ch. 138; 80 L. J. Ch. 163; 103 L. T. 712; 55 Sol. J. 188; 18 Manson, 159.

In an action where the main point was whether an arrangement or compromise between a company and its debenture-holders was valid, a point arose as to whether a contract with the Law Guarantee Trust and Accident Society, Ltd., guaranteeing the debentures was a contract of suretyship or of insurance.

HELD—that, on the facts, it was not a mere contract of suretyship, but was rather a contract of insurance, and was not destroyed by the disappearance of the debt.

Notes.—The cases of *Dane v. Mortgage Insurance Corporation* [1787] and *Finlay v. Mexican Investment Corporation* [1785] were treated as analogous, and *In re Denton's Estate* [1783] distinguished on the facts.

1785.—Finlay v. Mexican Investment Corporation, [1897] 1 Q. B. 517; 66 L. J. Q. B. 151; 76 L. T. 257.

A policy of insurance containing a recital that the assured is the holder of a debenture which matures on a specified date, and guaranteeing that if the debtor makes default in payment of any principal money "due under the debenture," the assurer will pay the same to the assured, constitutes a contract of insurance against a particular event—namely, the default of the debtor to pay to the assured the

amount of his debenture upon the specified date; and upon the debtor making such default the assurer becomes liable to the assured to the amount of the debenture, although payment of the debenture has under a condition indorsed thereon been postponed to a time later than the specified date.

1786.—Parr's Bank v. Albert Mines Syndicate (1900), 5 Com. Cas. 116.

An instrument addressed to the plaintiff bank, but in respect of which the defendant syndicate paid the premium, was subscribed by underwriters at Lloyd's and handed to the bank by the syndicate as security for a loan made to the syndicate upon the personal guarantee of two of the directors of the syndicate. By the instrument it was witnessed that the underwriters agreed to "guarantee" to the bank the repayment of the loan. Default having been made in the repayment of the loan by the syndicate and the sureties, the underwriters paid to the bank the amount thereof, and brought an action in the name of the bank against the syndicate and the sureties.

HELD—that the contract of the underwriters was one of insurance, and not of suretyship; that the underwriters, having paid the loss, were thereby subrogated to the rights of their assured, and were entitled to sue in the name of the assured, and to recover from the principal debtor and the sureties the amount of the loan and interest, and that the underwriters and the sureties did not stand in the relation of co-sureties.

II. *Deposit Guarantee.*

1787.—Dane v. Mortgage Insurance Corporation, [1894] 1 Q. B. 54; 63 L. J. Q. B. 144; 9 R. 96; 70 L. T. 83; 42 W. R. 227.

The plaintiff, having deposited with an Australian bank a sum of money for a fixed period at a fixed rate of interest, effected a policy of insurance with the defendant corporation, whereby the corporation contracted to pay the plaintiff the principal sum and interest if the bank made default in payment. The bank failed to pay the principal sum on the due date, and subsequently a scheme of arrangement between the bank and its creditors was sanctioned by the colonial court in accordance with the terms of a colonial statute, whereby certain provisions were made with regard to the claims of the creditors, and the creditors were bound to accept such provisions in satisfaction of their claims. The plaintiff having brought an action against the defendants on the policy:

HELD—that the scheme of arrangement afforded no answer to the plaintiff's claim.

1788.—Laird v. The Securities Insurance Co., Ltd. (1893), 22 R. 452 (Scotland).

An insurance office guaranteed to the holder of a deposit-receipt of an Australian bank payment of the deposit, "if the debtors make default for more than twenty-one days after" May 15th, 1893. By a condition in the policy upon a claim being made the office

could require a transfer of the deposit, and all the assured's rights in respect thereof.

The bank suspended on April 4th; notice of claim April 22nd; scheme of reconstruction approved by colonial court April 26th, subject to appeal. On May 15th deposit was due and was not paid. On June 17th scheme as altered by that court was approved by the Court of Appeal, and became binding upon the bank as from April 26th.

In an action on the policy for the amount of the deposit the office pleaded (1) no default on the part of the bank; (2) that the assured was unable to comply with the condition requiring transfer of the deposit.

HELD—(1) that the policy was a contract of indemnity and the assured was entitled to receive from the office what he had failed to receive from the bank at the stipulated date.

(2) That a transfer by the assured of such rights as he had would be a sufficient compliance with the condition.

1789.—Young v. The Trustee, Assets, and Investment Insurance Co., Ltd. (1893), 21 R. 222 (Scotland).

An insurance office guaranteed payment to a depositor of the deposit-receipt of a bank "after default."

The bank stopped payment and failed to pay the deposit-receipt at due date. Later it was reconstructed.

HELD (in an action on the policy)—that the bank was in default, and that the assured was entitled to recover the amount of the deposit-receipt from the office.

1790.—Murdock v. Heath (1899), 80 L. T. 50.

Plaintiff insured certain sums deposited in the M. Bank with the defendants, who undertook to pay him interest on such deposits should default be made by the bank "until the principal was paid by the bank and (or) the undertakers; and the principal sums, less any portion of the principal previously received from the bank when the final dividend in bankruptcy or liquidation is declared." A few days after the policy was entered into the M. Bank went into liquidation. It was reconstructed, and subsequently again went into liquidation. Under this second liquidation dividends to the extent of 5s. 7d. in the pound were paid to the plaintiff. The last of such dividends did not purport to be a final dividend, but practically the assets were exhausted, and what remained had been taken over by a new company for realisation. This new company offered shares to the plaintiff in payment of the balance of his deposits, which he in accordance with the provisions of the insurance policy rejected. The plaintiff then sued the defendants for payment of the balance of the deposits. The defendants contended that they were not liable to repay until the final dividend was paid on the liquidation of the M. Bank, and that the last paid dividend was not final, and the liquidation was not yet completed.

HELD—that they were liable.

III. *Mortgage Guarantee.*

- 1791.—**Birkbeck Permanent Benefit Building Society v. Licensees' Insurance Corporation and Guarantee Fund, Ltd.**, [1913] 2 Ch. 34; 82 L. J. Ch. 386; [1913] W. C. & I. Rep. 566; 108 L. T. 664; 57 S. J. 559.

A building society, which was registered under the Building Societies Acts, lent a sum of money upon mortgage and insured repayment of the loan. The policy of insurance contained a clause providing that the policy should cease to be in force if the whole or any part of the interest of the insured in the mortgage debt or mortgaged property or any part thereof should pass from the insured otherwise than by will or operation of law, unless notice in writing should be given to the insurers, and the insurance should be declared to be continued to a successor in interest by a memorandum made on the policy by them; and the expression "the insured" was declared to include a successor in interest to whom the insurance should be so declared to be or be otherwise continued. The building society was ordered to be wound up by the court, and the official receiver, as liquidator, gave notice to the insurers of his intention to assign the mortgage together with the policy; the insurers claimed the right to refuse their consent.

HELD—that, upon the true construction of the condition referred to, the insurers could not withhold their consent to an assignment after receipt of notice thereof; and further, that the official receiver being under an obligation to assign, the policy would pass to the assignee by operation of law, and that therefore the consent of the insurers was not required.

Note.—*Doe d. Goodbehere v. Bevan*, 3 M. & S. 353, followed.

- 1792.—**In re Law Guarantee Trust and Accident Society** (No. 1) (1913), 108 L. T. 830; 57 S. J. 628.

Where a guarantee society contracted to pay the principal and interest due on a mortgage on the mortgagor making default in payment thereof, it was held that the guarantee society did not contract to indemnify the policy holder against any loss under her security, and, accordingly, that in the winding-up of the guarantee society the costs of valuing her security and proving her claim came under the heading of mortgagee's costs or costs of proof, and must be disallowed because under the winding-up rules creditors are not entitled to the costs of proving their claim.

IV. *Debenture Guarantee.*

- 1793.—**In re Law Guarantee Trust and Accident Society** (No. 2) (1913), 29 T. L. R. 776.

In 1900 a guarantee society guaranteed the debentures of S. W. & Co., and contracted with an insurance company for a re-insurance "to the extent of £5,000., being two-elevenths of the risk insured." The business of S. W. & Co. was not successful, and in September, 1909, the guarantee society entered into possession of their property

and assets. In December, 1909, the guarantee society went into voluntary liquidation, which subsequently was continued under the supervision of the court. A scheme of arrangement was sanctioned and by it the insurance company agreed to be bound, with the result that they were not to be liable to pay their proportion of any claims in respect of risks re-insured by them until the guarantee society made a payment under the scheme. In 1910 the guarantee society realised the assets of S. W. & Co., and as there was a deficiency for which the debenture holders of S. W. & Co. proved in the liquidation of the guarantee society the liquidator of the guarantee society made a claim for this deficiency on the insurance company.

HELD—that the only amount the guarantee society could recover and retain on their own behalf was limited to the amount they actually paid in discharge of their liability to the debenture holders of S. W. & Co., and that if they recovered the whole of the amount re-insured by the insurance company they would hold it on behalf of the debenture holders of S. W. & Co., and not for the benefit of their own general creditors.

1794.—The Law Guarantee Trust and Accident Society, Ltd. v. The Munich Reinsurance Co., Ltd., [1912] 1 Ch. 138; 81 L. J. Ch. 188; 105 L. T. 987.

On a re-insurance of a risk whereby the office re-insuring guarantees debentures (or generally) the re-insurers are discharged if the risk is varied in substance, but the alteration must be a real alteration, not only such a one as on the construction of the contract must be taken to be within the contemplation of the parties.

V. Solvency Guarantee.

1795.—Seaton v. Heath or Burnand, [1900] A. C. 135; 69 L. J. Q. B. 409; 82 L. T. 205; 5 Com. Cas. 198; 16 T. L. R. 232—H. L. (E.).

In the case of a Lloyd's policy to guarantee the solvency of a surety for a debt, enquiry was made by the underwriters, the result of which satisfied them, with respect to the pecuniary position of the surety. No questions were asked and no disclosures made regarding the terms of the loan to the principal debtor. Both parties acquiesced in the questions submitted at the trial to the jury, and verdict and judgment were entered for the insured. The Court of Appeal ordered a new trial on the ground that other questions should have been left to the jury.

The House, on the facts, reversed the decision of the Court of Appeal ([1899] 1 Q. B. 782; 68 L. J. Q. B. 631; *sub nom. Seaton v. Heath*), and restored the judgment of Bigham, J., on the grounds that the only material fact in the transaction was the solvency of the surety, that there had been no fraud or concealment on the part of the insured, and no misdirection by the judge.

Notes.—It appeared that from the evidence at the time the insurance was effected there was no ground whatever to believe

or anticipate that the person whose solvency was guaranteed was or would be embarrassed financially.

1796.—MacVicar and Another v. Poland (1894), 10 T. L. R. 566.

The defendant and others by a policy of assurance guaranteed the plaintiffs against "any loss they might sustain" in consequence of the failure of a certain bank and in consequence of the insolvency of office X. (who had guaranteed a deposit made by the plaintiffs with the bank). It was admitted that the bank had failed. The questions were (1) was office X. insolvent? (2) had defendant suffered loss thereby in consequence of the insolvency?

Office X. had passed a resolution to wind up. They had a reserve fund. Payment of the claim by plaintiffs on them (office X.) was rejected, not on the ground of insolvency, but because of a certain dispute then remaining for settlement in which dispute office X. were parties.

HELD—that the defendant was liable. That this was a contract of indemnity, that office X. was insolvent, and that there had been a loss to the plaintiffs in consequence of such insolvency.

1797.—Anglo-Californian Bank v. London and Provincial Marine and General Insurance Co. (1904), 10 Com. Cas. 1; 20 T. L. R. 665.

The plaintiffs agreed to discount acceptances of Gaze & Sons provided that Gaze & Sons obtained the following security—first, a policy or guarantee by which the underwriters agreed that if Gaze & Sons failed to meet the acceptances the underwriters would pay the amount, the liability of the underwriters respectively being limited to certain specified amounts; secondly, a policy from the defendants by which the defendants guaranteed the solvency of the underwriters of the first policy. The first policy was obtained for a total amount of £3,750, and purported to be underwritten by five names, each for £750, but, in fact, the name of one underwriter was signed without his authority, and he, therefore, never became liable upon the policy. The second policy contained a recital that certain underwriters had signed the first policy and that the names and signature of the underwriters or their attorneys were known to the defendants. Gaze & Sons went into liquidation and failed to meet their acceptances, and the four underwriters who were liable on the first policy became insolvent. In an action against the defendants on the second policy:

HELD—(1) that, in the absence of evidence of an express agreement to that effect, the fact that one underwriter to the first policy never became liable to the plaintiffs did not discharge the remaining four from their liability upon that policy.

(2) That evidence was not admissible to show that it was a condition precedent to the defendants' liability upon the second policy that the fifth underwriter should be liable to the plaintiffs on the first policy, inasmuch as the recital in the second policy that the underwriters had signed the first policy was inconsistent with oral evidence that the defendants were not to be liable unless the fifth underwriter had subscribed the first policy. The difference between

the rules of construction of an ordinary Lloyd's marine policy and other policies on guarantees explained.

VI. *Guarantee against Loss from bad Debts.*

1798.—Solvency Mutual Guarantee Society v. York (1858), 3 H. & N. 588; 27 L. J. Ex. 487; 117 R. R. 869.

A declaration stated that by an agreement between a guarantee company and the defendants, after reciting that they had delivered to the company a declaration stating the amount of their business and losses during the three years preceding, and that they were desirous of being guaranteed by the company in respect of their future sales, it was agreed that if they should pay the sums therein-after mentioned, and should comply with the provisions of the deed of settlement of the company, the funds of the company should be liable to pay the defendants nine-tenths of their losses in respect of sales during three years and one month from December 1st, 1853, unto December 31st, 1856, and during any further period the defendants should contribute to the funds of the company, and the company should consent to receive further payments; but subject always to the provisions contained in the deed of settlement, and also to a proviso that every guarantee upon annual returns should, from the expiration of the original term, be treated as a renewed contract, unless either the member interested therein or the directors should give notice of an intention not to renew the same. The declaration then alleged that the defendants agreed to pay the company £43 15s. in each year during the guarantee that the agreement so made was an agreement on gross annual returns within the meaning of the proviso, and that no notice of an intention not to renew the guarantee had been given by either party, and alleged as breach the non-payment of an instalment of £43 15s., being the premium for 1857, and £10 18s. 9d., an instalment for 1858. Pleas, first, that the sums are claimed in respect of periods after December 31st, 1856, and that after such date the defendants refused to contribute to the funds of the company. Secondly, that the company had become dissolved, and was amalgamated with another company. Thirdly, for defence on equitable grounds, a plea stating an agreement to amalgamate, as in the second plea.

HELD—that the first plea was bad, for the stipulation for notice was part of the contract, and no notice having been given, the agreement continued for another three years.

HELD ALSO—that the second and third pleas were bad, since it did not appear that the company was not empowered by their deed of settlement to amalgamate.

1799.—In re Solvency Mutual Guarantee Society, Hawthorne's Case (1862), 31 L. J. Ch. 625; 8 Jur. N. S. 934; 6 L. T. 574; 10 W. R. 572.

A. effected an insurance against bad debts for a term of three years, the following condition as to withdrawal being indorsed on the policy:—"Every guarantee shall be made for a specified term; but all guarantees upon gross annual returns, floating risks, or rent,

whatever may be the original term of the same, shall from the expiration of such original term be treated as a renewed contract of the like nature and conditions, unless either the member interested therein, or the board of directors, shall give two calendar months' notice of an intention to renew the same." The first year's premium was paid by A., and a claim admitted by the office in respect of a bad debt was set off against the remaining premiums, leaving a balance still due from A. A. being dissatisfied at not receiving the actual money, told B., the agent with whom he had effected the policy, that he should withdraw from the society, and have nothing further to do with it. He made no further payments in respect of premiums, nor were any demanded from him by the office.

HELD—that there had been sufficient notice of withdrawal in accordance with the condition annexed to the policy to determine the contract at the end of the time, and that A. was not liable as a contributory.

HELD ALSO—that B. was a sufficient agent of the company for the purpose of receiving such notice.

1800.—Solvency Mutual Guarantee Co. v. Froane (1861), 7 H. & N. 5; 31 L. J. Ex. 193; 7 Jur. N. S. 899; 126 R. R. 293.

By an agreement between a company and the defendants, in consideration of a certain sum, it was agreed that the funds of the company should be subject and liable to make good to the defendants the loss occasioned to them during the term of two years by reason of any of the purchasers of their goods becoming bankrupt within such time, and during any future period in respect whereof the company should consent to receive further payments, but subject to the conditions indorsed on the instrument. One of the conditions indorsed was, that all guarantees, whatever might be the original term, should, from the expiration of such original term, be treated as a renewed contract of the like nature and conditions, unless either the members interested therein, or the board of directors, should give two calendar months' notice of an intention not to renew the same.

HELD—that the renewed contract was not itself to be deemed to contain this particular condition as to the renewal, and that therefore, even in the absence of notice, the contract did not extend beyond one renewal.

HELD ALSO—the rescission need not be by deed.

Notes.—This judgment follows to some extent the *dictum* of Lord Ellenborough in *Iggulden v. May* (1806), 7 East, 237, at p. 242; 8 R. R. 623, at p. 627, to the effect that "a new lease is the same as one new lease." Here "a renewed contract" was held to amount to one renewed contract.

1801.—Solvency Mutual Guarantee Co. v. Freeman (1861), 7 H. & N. 17.

The plaintiff office guaranteed a firm, consisting of two partners in trade, against loss in respect of their gross annual returns. The guarantee was subject to the following condition: "If a member of

this company shall die, or if any member guaranteed with respect to his gross or particular trade debts shall cease to be such trader, his guarantee or contract shall become void upon such death, or (if such trader) on his retiring from such trade.”

HELD—that under this condition the guarantee became void upon the retirement of one of the two partners from the trade.

In an action for payment of premiums the assured pleaded as an equitable defence that (in effect) the policy issued was different from the proposal and declaration.

HELD—no defence, the proper remedy being a rectification of the policy.

VII. *Miscellaneous.*

1802.—*Carpenter v. Solicitor to the Treasury, In goods of Stokes* (1882), 51 L. J. P. 91; 7 P. D. 235; 46 L. T. 821; 31 W. R. 108; 46 J. P. 663.

The security of a guarantee society may be taken in the case of a receiver in a probate action.

1803.—*Colemore v. North, Colemore v. Radcliffe* (1872), 27 L. T. 405.

The security of a guarantee society may be accepted in the case of a receiver in a cause.

1804.—*Aldrick v. British Griffin, etc., Co.*, [1904] 2 K. B. 850.

There is no general rule to the effect that the bond of a foreign company will never be regarded as sufficient security for costs.

Notes.—See also *In re Goldfields of Venezuela*, an appeal case unreported referred to, [1904] 2 K. B. 852, n.

1805.—*Harris v. Sleep*, [1897] 2 Ch. 83.

A receiver and manager appointed without salary or remuneration is entitled to be allowed in his accounts premiums paid by him to a guarantee society as his surety.

PART XXIV.

SPECIAL RISKS.

THE cases which follow are classified according to the risk covered, viz. :—

- I. Employers' Liability Insurance.
- II. Live Stock Insurance.
- III. Insurance against Loss by Burglary.
- IV. War Risks Insurance.
- V. Plate Glass Insurance.
- VI. Boiler Insurance.
- VII. Meeting Receipts Insurance.
- VIII. Lottery and Ballot Insurance.
- IX. Hail Insurance.

I. Employers' Liability Insurance.

1806.—*In re Coleman's Depositories, Ltd., and Life and Health Assurance Association*, [1907] 2 K. B. 798; 76 L. J. K. B. 865; 97 L. T. 420; 23 T. L. R. 638. See S. C. 1732.

The respondents signed a proposal form for insurance by the appellants against injury by accident to their workmen, and received a cover note, signed by the appellants' local agent, which contained the words "cover to hold good from this date." A few days subsequent to the receipt of the covering note, one of the respondents' workmen received injuries in the course of his employment which resulted in death nearly three months later. A policy, sealed by the appellants the day following the accident, but only delivered to the respondents about a week later, contained a clause that "the employer shall give immediate notice to the" appellants "of any accident . . . and shall forward to the" appellants "every written . . . notice of claim received within three days after receipt" thereof, and also a clause that the observance and performance by the respondents of the times and terms above set out, so far as they contained anything to be done by the respondents, were to be of the essence of the contract. No notice of the accident was given until the day before the workman's death, when verbal notice was given to the appellants' local representative. Subsequent to the workman's death written notice of a claim by his dependants for compensation was given to the respondents; but this was not forwarded to the appellants, who were merely informed by letter that such a claim had been made. The appellants having repudiated liability, the respondents, in arbitration proceedings, settled the claim for compensation, and sought to recover the amount so paid from the appellants.

HELD (Vaughan Williams, L.J., and Buckley, L.J.; Fletcher Moulton, L.J., *diss.*)—that the giving of immediate notice of the accident was not a condition precedent to the respondents' right to recover, inasmuch as, in the absence of evidence that the respondents knew or had the opportunity of knowing the conditions of the policy (the *onus* of proving which lay on the appellants), the risk undertaken by the appellants for the period prior to the delivery of the policy did not impose upon the respondents the obligation to give such notice prior to the receipt by them of the policy or of information that it contained such a condition.

HELD ALSO—that the appellants, by repudiating the claim for compensation, had waived performance of the condition that the respondents should forward to the appellants the written notice of claim for compensation within three days after receipt thereof by the respondents.

1807.—Holdsworth v. Lancashire and Yorkshire Insurance Co. (1907),
23 T. L. R. 521.

The plaintiff effected an insurance with an insurance company through their agent against the liability to his workmen under the Workmen's Compensation Act, 1897. The plaintiff was, to the knowledge of the agent, a joiner and builder. The agent filled in a proposal form, which was stated to be the basis of the contract, and in which the plaintiff was described as a joiner. The plaintiff did not read the form, but when the policy arrived he objected to his being described as a joiner, and refused to take up the policy with that description in it, and the agent obtained the sanction of the chief clerk of the insurance company's branch office for the district to alter the policy by inserting the words "and builder" after the word "joiner." This was accordingly done, and the plaintiff paid the first premium, and he continued to pay the premiums, which were forwarded to the company. No communication was made to the head office of the company of the addition to the policy. A workman in his employment having been injured by an accident, the plaintiff had to pay him compensation under the Workmen's Compensation Act, 1897, and sued to recover the amount from the company under the policy.

HELD—that the company were liable, upon the grounds—first, that, by receiving the premiums, they were precluded from denying the agent's authority to alter the contract, and that in those circumstances the knowledge of the agent was the knowledge of the company; and secondly, that, even if the policy had not been altered, the company would have been liable, because the contract must be treated as having been negotiated by the agent with a joiner and builder, and the knowledge of the agent must be treated as the knowledge of the company.

Notes.—*Wing v. Harvey*, 5 De. G. M. & G. 265 [99], was relied on in judgment, also *Hough v. Guardian Fire, etc.*, 18 T. L. R. 273 [337]. On the second point *Bawden v. London, Edinburgh and Glasgow*, [1892] 2 Q. B. 534 [1705], was followed.

1808.—Bradley v. Essex and Suffolk Accident Indemnity Society, Ltd.,
 [1912] 1 K. B. 415; 81 L. J. K. B. 523; 105 L. T. 919; 28
 T. L. R. 175.

A policy for insurance against employers' liability risks contained the following clause: "The first premium and all renewal premiums that may be accepted are to be regulated by the amount of wages and salaries and other earnings paid to employés by the insured during such period of insurance. The name of every employé and the amount of wages, salary, and other earnings paid to him shall be duly recorded in a proper wages-book. The insured shall at all times allow the society to inspect such books, and shall supply the society with a correct account of all such wages, salary, and other earnings paid during any period of insurance within one month from the expiry of such period of insurance, and if the total amount so paid shall differ from the amount on which premium has been paid the difference in premium shall be met by a further proportionate payment to the society or by a refund by the society as the case may be." The insured only employed one person, his son, and kept no wages-book.

HELD (Fletcher Moulton, L.J., *diss.*)—that the clause had one object, viz., adjustment of premium, that it was whole and did not comprise two separate parts and that consequently (following *London Guarantee Co. v. Fearnley* [1777]) it did not amount to a condition precedent and the assured could recover.

1809.—General Accident Assurance Corporation v. Day (1905), 21
 T. L. R. 88.

An employer insured against his liability as such under the Workmen's Compensation Act, 1897, and at common law. The proposal stated that the total estimated amount of wages paid annually was £3,000. He agreed to pay a premium of 5s. 6d. per cent. on the total amount of wages paid and to render at the end of each year an account of the wages paid. The first premium was an amount equal to 5s. 6d. per cent. on £3,000. It was described as being made "on account of premiums." The assured ceased to insure at the end of the second year.

HELD—that the assured was bound to render an account of wages actually paid during the two years, and that in the absence of any condition in the policy the employer was bound to account although the office supplied him with no form on which to make such account.

1810.—Morrison and Mason v. Scottish Employers' Liability and Accident Assurance Co. (1888), 16 R. 212 (Scotland).

By an employers' liability insurance policy the defenders agreed to "pay to the employer all sums which such employer shall become liable for under or by virtue of the Employers' Liability Act, 1880, as and for any compensation for personal injury caused to any workman in their service, while engaged in the employer's work."

A workman was injured and recovered damages from his employer the assured, but he proceeded at common law and not under the Employers' Liability Act, 1880.

HELD—that the loss was not within the risk. The test being “was the action *de facto* prosecuted ‘under or by virtue’ of the Act?”

Notes.—Some little stress is placed on the fact that under the Act notice would have to be given by the workman and no such notice had been given.

1811.—Wilkinson v. Car and General Insurance Corporation (1912), 108 L. T. 512.

By the terms of a policy of insurance against claims arising under the Workmen's Compensation Act, 1906, it was provided that the assured should forward to the insurance company “every written notice or information as to any verbal notice of claim arising through any accident” covered under the policy, and should also give all such information and assistance as the company might require to enable the company to settle or resist any claim as the company might think fit. An accident having happened to a workman in the employment of the assured, proceedings under the Workmen's Compensation Act were instituted against him in the county court, and a notice of claim, accompanied by request for arbitration, was sent to him by the registrar. The assured forwarded the notice of claim to the insurance company, but not the request for arbitration. In arbitration proceedings by the assured under the policy to recover the amount of compensation which he had been compelled to pay, the company resisted liability on the ground that the assured had not complied with the conditions of the policy by reason of the fact that he had not forwarded to them the request for arbitration. A special case for the opinion of the court having been stated by the arbitrator:

HELD—that the request for arbitration was not a written notice of claim within the meaning of the policy, and that the award must be in favour of the assured.

1812.—Law Car and General Insurance Corporation, In re ; King & Sons', Ltd., Claim (No. 2), [1913] 2 Ch. 103 ; [1913] W. C. & Ins. R. 606 ; 82 L. J. Ch. 467 ; 108 L. T. 862 ; 57 S. J. 556 ; 29 T. L. R. 532—C. A. Reversing 20 Manson, 44.

Holders of an employers' liability policy of an insurance company which became insolvent and was ordered to be wound up put in a proof making claims in respect of accidents to their workmen which had occurred after the date of the winding-up order, but while the policy was still current.

HELD (Buckley, L.J., *diss.*)—that the mode of valuation of a policy prescribed by the Assurance Companies Act, 1909, s. 17, and Sched. 6 (D), excluded claims in respect of liabilities under a policy which emerge subsequently to the date of the winding-up order.

The principle of valuation adopted in *Northern Counties of England Fire Insurance Co., In re*, 50 L. J. Ch. 273 ; 17 Ch. D. 337, is negatived in the case of companies within the Assurance Companies Act, 1909.

Per Buckley, L.J. : The value as at the date of the winding-up order of liabilities under a current policy which emerge after the date of the winding-up order and before proof may be included in the value of the policy under the Assurance Companies Act, 1909, Sched. 6 (D).

1813.—Morton v. Ontario Accident Insurance Co. (1909), 14 O. W. R. 1010 ; 1 O. W. N. 199 (Ontario).

It is unlawful in Ontario to employ a child of fourteen in a factory. The assured employed a child under fourteen. The child was injured. The assured claimed under his policy. The policy contained a clause to the effect that the insurance did not cover injuries caused or received by any child illegally employed with the knowledge of the insured.

HELD—that the *onus* was upon the office to prove knowledge, and they had not discharged it.

II. *Live Stock Insurance.*

N. B.—*See also Taylor v. Yorkshire Insurance* [98] (*duty to disclose as in life insurance*) ; *Linford v. Provincial etc.* [74] (*agent's powers to effect contract of insurance*).

1814.—Att.-Gen. v. Cleobury (1849), 4 Ex. 65 ; 18 L. J. Ex. 395.

A policy on the lives of cattle was an insurance on lives, within 55 Geo. 3, c. 184, and liable to duty.

1815.—Shiells v. Scottish Assurance Corporation, Ltd. (1889), 16 R. 1014 (Scotland).

By a clause, declared to be a condition precedent, in a policy insuring against the death of a horse from accident or natural disease, it was provided that in the event of the animal insured receiving any injury, the owner should have it attended at once by a qualified veterinary surgeon, and should forward his report to the insurance company, and that on the death of an insured animal, notice should be sent to the company's office accompanied, or followed as speedily as possible, by the report of a qualified veterinary surgeon. It was further provided that notice to an agent of the office should not be deemed a sufficient compliance.

The horse broke its leg, and the assured, on the advice of a veterinary surgeon who was not registered as such, had it shot, and wired the agent of the office that the horse had broken its leg and had been condemned. This was communicated at once to the manager of the office, by whom liability was repudiated immediately. No veterinary surgeon's report was forwarded to the office.

HELD—that the assured could recover because (1) that the horse had been fatally injured and the advice given was proper, and was given by a veterinary surgeon qualified in fact to give it though not qualified in the strict sense, *i.e.*, by registration ; (2) although notice had been sent to the agent and not to the office still in fact it had been transmitted to the office ; (3) the office had waived their right to insist on the condition requiring a report to be forwarded by their repudiation of liability.

Per Lord Justice-Clerk Macdonald (at p. 1019): "The pursuer, under such a policy as this, if he adopts the alternative of putting the animal to death, undertakes the *onus* of showing that death was inevitable in the circumstances."

Notes.—This case was treated as one of death, not of injury, and the condition was regarded as divisible, one part applying to cases of injury, and one part to cases of death, consequently the qualification of the veterinary surgeon was not considered very much in the judgments.

1816.—Beeck v. Yorkshire Insurance Co. (1909), 11 W. A. L. R. 88 (Australia).

A policy of insurance over live stock contained a condition in the following terms: "On the death of any animal hereby insured, the insured shall within twelve hours, give notice in writing direct to the company's offices, and shall, if required by the company, at his own expense have a *post mortem* examination, etc. . . . The insured shall within twenty-one days thereof, furnish to the company particulars of his claim on the printed form of the company, and shall furnish such information, veterinary certificates, and satisfactory proof as to the death, identity, and market value of the animal as the directors may require."

A death occurred; a claim was duly made. In reply the solicitors of the office wrote the assured's solicitors saying: "We shall be glad if you will get your client to fill up the enclosed statutory declaration." The said declaration was in the form of a number of questions and answers with a clause attached that if any of the answers thereto were false or part thereof, the claim for compensation should be forfeited, and the policy null and void. The assured refused to sign the statutory declaration, and the office refusing compensation, this action was brought.

HELD—(1) The letter above mentioned did not constitute a request within the meaning of the condition.

(2) The declaration was beyond what the directors could demand, since in effect it was a proposal to substitute a new contract.

1817.—Jacob v. Gaviller (1902), 7 Com. Cas. 116.

A Lloyd's policy insured a dog from Mersey to Bombay and thence by rail to Lahore. It contained in addition to the common form conditions, the following clause: "This insurance is against all risks, including mortality from any cause, jettison, and washing overboard, but walking at Lahore, Punjab, to be deemed a safe arrival." During transit the dog was injured in one leg and on arrival could only walk on three legs.

HELD—that the insurers were liable on the grounds that (1) the words "all risks" included the injury suffered; (2) "walking at Lahore" meant walking in the usual way, *i.e.*, on four legs. But Kennedy, J., expressed an *obiter dictum* that "walking at Lahore, etc." did not merely qualify the risk of mortality but all the risks covered.

1818.—Clarke v. British Empire Insurance Co. (1912), 22 W. L. R. 89; 6 D. L. R. 353 (Canada).

In the application for a live-stock policy on a stallion's life the applicant misstated the value, the age and the time the applicant had had the animal.

HELD (reversing Beck, J.)—that the policy was invalidated.

Notes.—Beck, J. (21 W. L. R. 774) pointed out that the statement of value was a matter of opinion merely, and this was not dissented from on appeal.

1819.—Limer v. Western Assurance Co. (1874), 7 R. L. 242 (Quebec).

The company held liable in this case for the loss of a horse insured by them, the death arising from the effects of the roughness of the sea.

III. *Insurance against Loss by Burglary.*

1820.—George v. Goldsmiths' and General Burglary Insurance Association, [1899] 1 Q. B. 595; 68 L. J. Q. B. 365; 80 L. T. 248; 47 W. R. 474; 15 T. L. R. 230.

A policy, after reciting that the plaintiff was desirous of insuring his goods against loss or damage "by burglary and housebreaking as hereinafter defined," witnessed that if the goods should be lost "by theft following upon actual forcible and violent entry upon the premises," the defendants would make such loss good. The premises were described in the proposal for the policy as shop, warehouse, and dwelling, protected by wood shutters and iron bars and iron plates inside. Early in the morning, during the temporary absence of the shopman, a thief entered the shop by turning the handle of the door, and having wrenched an iron plate to which a locked padlock was attached off the door of a glass shop front or show case, stole the goods in the show case.

HELD—that the entry by the thief was not an "actual forcible and violent entry upon the premises" within the meaning of the policy, so as to entitle the plaintiff to recover, inasmuch as the entry contemplated was an entry effected by real violence or force, and not, for instance, by stealth.

HELD ALSO—that, assuming the entry effected by turning the handle of the door was not an "actual forcible and violent entry," then what happened afterwards in the shop did not constitute an entry within the meaning of the policy, as the entry must be an entry from outside the shop.

1821.—Saqui v. Stearns (1910), 103 L. T. 583; 55 S. J. 91; 27 T. L. R. 105.

A policy issued by the defendant insuring against loss by theft or robbery or burglary contained the following clause: "Provided always that there shall be no claim on this policy . . . for loss by theft, robbery, or misappropriation by members of the assured's

... business staff . . .” A theft of the assured’s goods having been committed by a gang of men who gained admittance to the insured premises through the agency of an employee of the assured :

HELD—that there had been a loss by theft by a member of the assured’s business staff within the meaning of the proviso in the policy, and therefore that the defendant was not liable.

1822.—Samuels v. Thompson (1910), *Times*, November 12th.

Where the defendant, being sued on a valued policy covering loss by burglary, denies the loss, one method of destroying the plaintiff’s case is to show that every person who could have committed the burglary in fact has not done so, but in such a case the process of elimination must be logically complete.

1823.—In re Clements and The National General Insurance Co.’s Arbitration (1910), *Times*, June 10th, p. 5.

This was an arbitration on a burglary policy on a private house. A clause avoided liability after the house had been unoccupied for more than seven consecutive days. The assured went abroad leaving the house with nobody residing there permanently, but a servant visited it every day at various times staying there for two to three hours.

HELD—that the house was “unoccupied” and that the assured could not recover.

1824.—Hodgkins v. Wrightson (1910), *Times*, March 24th, p. 3.

A burglary policy contained a clause avoiding the policy if the assured made a false or fraudulent claim knowingly. He claimed £507; the jury found that it should have been £150.

HELD—that on this finding judgment must be entered for the defendant.

1825.—Wood v. Grose (1896), 5 B. R. 116 (Quebec).

Where a company incorporated to protect premises against fire and burglary by means of wires and attachments connected with a central office contracts with a firm to attach its system of protection to their premises, in consideration of a monthly payment of \$10, and at the same time, by a subsidiary writing, agrees to make good any loss caused by burglary to the extent of \$2,500 while the establishment is under the company’s protection :

HELD—that the contract between the parties amounted to a contract of insurance.

A company issuing such policies of insurance is required, by 57 & 58 Vict. c. 20, s. 15 (Que.) to obtain a licence from the Minister of Finance to carry on the business of such insurance in Canada, and the officer of the company who delivers such a policy of insurance, or collects any premium therefor, without such licence being held by the company, is liable to a penalty not exceeding \$50 nor less than \$10 and costs.

IV. *War Risks Insurance.*

1826.—*Nigel Gold-Mining Co. v. Hoade*, [1901] 2 K. B. 849; 70 L. J. K. B. 1006; 85 L. T. 482; 50 W. R. 108; 6 Com. Cas. 268; 17 T. L. R. 711.

A company incorporated and registered in a British colony and owning and working a gold mine in an adjoining foreign State insured the products of the mine with an English insurer against "arrests, restraints, and detainment of all kings, princes, and people." Subsequently war broke out between Great Britain and the foreign State, and the company thereupon ceased to work the mine. During the war certain products of the mine were seized by the foreign State.

HELD—that these products were not to be regarded as enemy's property, and that there was no ground of public policy which prevented the policy from continuing in force after war was declared, and that the company were not prevented from recovering their value under the policy.

Notes.—Reference may be made usefully to the *dictum* of Mathew, J. (at 2 K. B., p. 853) as to the validity at the present day of the early nineteenth century prize cases. See also the judgments in the House of Lords in *Janson v. Driefontein Consolidated Mines* [1827], where most of the prize cases are referred to and considered.

1827.—*Janson v. Driefontein Consolidated Mines*, [1902] A. C. 484; 71 L. J. K. B. 857; 87 L. T. 372; 51 W. R. 142; 7 Com. Cas. 268; 18 T. L. R. 796—H. L. (E.).

The respondents, a company registered under the law of the South African Republic, insured gold against (*inter alia*) "arrests, restraints, and detainments of all kings, princes and people" during transit from Johannesburg to this country. After the policy was perfected, on October 2nd, 1899, the gold was seized on the Transvaal frontier by order of the South African Republic. On October 11th, 1899, war broke out.

Subsequently an action on the policy was commenced.

HELD—(1) the insurance was valid since the seizure and the completion of the policy both took place before the declaration of war.

(2) The action could be maintained in this country after the restoration of peace though the seizure was made in contemplation of war and in order to use the treasure in support of the war.

(3) Such an insurance is not against public policy.

1828.—*Curtis v. Head* (1901), 18 T. L. R. 771.

The plaintiff effected an insurance on "the contents" of their clothing store at Johannesburg against "direct loss or damage to the above property by riot, rebellion, or war," no indirect loss being recoverable. During the war between Great Britain and the Transvaal the Transvaal Government seized the goods in the store for the

use of the troops in the field. This seizure was in accordance with the laws of the Transvaal.

HELD (by Mathew, J. (17 T. L. R. 718))—that the loss was covered by the policy. The defendant did not appeal from this decision, but merely appealed upon the question whether a sum paid into court was not sufficient, and on this point the appeal was dismissed.

1829.—Robinson Gold-Mining Co. v. Alliance Marine and General Assurance Co., [1904] A. C. 359; 73 L. J. K. B. 898; 91 L. T. 202; 53 W. R. 160; 9 Com. Cas. 301; 20 T. L. R. 645—H. L. (E.).

Gold consigned to Europe by a company registered under the laws of the late South African Republic was on the eve of war requisitioned within the territory of the Republic by the Government. No resistance was made, and a receipt was given. The gold was insured under a policy which contained a clause, "Warranted free of capture, seizure, and detention, and the consequences thereof."

HELD—that the gold was "seized" within the meaning of the warranty, and that the insurers were not liable.

1830.—Molinos de Arroz v. Mumford (1899), 16 T. L. R. 469.

Rice requisitioned for food by one of the belligerents held to be a loss "caused by war" within the meaning of a policy.

V. Plate Glass Insurance.

1831.—Marsden v. City and County Insurance Co. (1866), 1 H. & R. 53; 35 L. J. C. P. 60; L. R. 1 C. P. 232; 12 Jur. N. S. 76; 13 L. T. 465; 14 W. R. 106.

A policy contained a recital, that it was agreed that plate-glass in which the insurer was interested should be insured "from loss or damage originating from any cause whatsoever, except fire, breakage during removal, alteration or repair of premises, . . . none of the glass being horizontally placed or movable," and then insured the owner from all damage or loss "from any cause whatever, except only as above specified, according to the exact tenor" of the printed conditions indorsed on the policy. A fire broke out on premises adjoining the shop of the insured, who thereupon opened the shop door, and admitted neighbours to save his property; during the removal the mob, which had been attracted by the fire, broke down the shutters and destroyed the glass, for the purpose of plunder.

HELD—that the damage to the glass did not originate from fire, or from breakage during removal, within the meaning of the exception in the policy.

Per Willes, J. (at p. 61): "The word 'originating' does not prevent the operation of the rule *in jure non remota causa sed proxima spectatur* any more than the word 'consequences' did in *Ionides v. The Universal Marine Insurance Co.* (1863), 14 C. B. N. S. 259."

The policy, which had been effected through L., the local agent of the company, was also subject to a condition that, "in case of loss

or damage, an immediate notice must be given to the manager, or to some known agent of the company." After the making of the policy, and before the loss, the company transferred this branch of its business to another company. The assured (not being aware of this transfer) gave notice of the damage to L., who made his report thereon to the latter company.

HELD—that the notice to L. was a sufficient notice within the condition.

1832.—London and Manchester Insurance Co. v. Heath, [1913] W. C. & Ins. R. 696; 108 L. T. 1009; 29 T. L. R. 581.

The defendant re-insured the plaintiffs "against damage to plate-glass caused directly by or arising from civil commotion or rioting." During the currency of the policy a large number of women in different parts of London broke windows with hammers. When the women were arrested in respect of this they went quietly to the police station; there was no commotion in the streets, and no sympathy was shown for them by the public.

HELD—(1) that the damage was not caused by or arose from "civil commotion or rioting" within the meaning of the policy, and therefore that the defendant was not liable.

(2) That the fact that the defendant had previously made a payment under a policy in the same words under similar circumstances did not show that he impliedly contracted to be bound under the policy sued on in the event of similar circumstances again arising.

Per Buckley, L.J.: "An organised conspiracy to commit criminal acts, without more, does not amount to civil commotion."

Notes.—Lord Mansfield's definition of civil commotion given in *Langdale v. Mason* (Park Ins. (8th ed.), p. 965) relied upon.

VI. Boiler Insurance.

1833.—Canadian Casualty and Boiler Insurance Co. v. Boulter-Davies & Co. (1907), 39 Can. S. C. 558.

An insurance policy covered loss by leakage or discharge from a sprinkler system for protection against fire, but provided that it would not cover injury resulting, *inter alia*, from freezing. The water in a pipe connected with the system froze and burst, causing damage by the resulting escape of water.

HELD (Davies, J., *diss.*)—that the damage did not immediately result from freezing, and that the loss was within the risk.

Notes.—The condition under consideration here ran as follows: "This policy of insurance does not cover loss or damage resulting from the explosion, rupture, collapse or leakage of steam pipes or steam boilers; nor resulting from any interruption of business or stoppage of any work or plant, *nor resulting from freezing.*" The policy itself declared that it covered all *immediate* loss or damage caused by accidental leakage or discharge, etc. The court read the word *immediate* into the above condition and consequently limited

the condition as follows: "*nor immediately resulting from freezing.*" Then the court found that the loss was not caused *immediately* by the freezing but by the leaking.

VII. *Meeting Receipts Insurance.*

1834.—London County Cycling and Athletic Club v. Beck (1898), 3 Com. Cas. 49.

Underwriters at Lloyd's insured the amount to be received at a cycling meeting in the sum of £250, "provided that the expenses attaching to the meeting" should not be less than a certain named sum.

HELD—that the cost of effecting the insurance was an expense attaching to the meeting.

VIII. *Lottery and Ballot Insurance.*

1835.—Duffell v. Wilson (1808), 1 Camp. 401.

W. insured D. against being drawn by ballot to serve in the militia. In the *receipt* given on receipt of the premium the insurer made a false representation as to the period during which ballotings were to continue. It appeared from the receipt as though the insurance continued for a month after the latest time that ballotings could be made, in fact ballotings continued after the date of the insurance lapsed. Later the assured was informed of this, and a further premium was required to cover this extended time. This the assured refused to pay. After his insurance had lapsed a ballot took place and he was chosen and had to pay £18 to avoid service. This action was to recover the £18 from the insurer.

HELD—(1) The contract of insurance was terminated and therefore the assured could not recover under it, but

(2) There was a misrepresentation which entitled the assured to recover the premiums paid as money had and received to his use.

1836.—Jacques v. Golightly (1777), 2 Wm. Bl. 1073. See S. C. [946].

Money paid as a premium for insuring lottery tickets may be recovered back, though the winnings cannot be, lotteries being illegal by statute.

The insurance in such a case is null and void.

IX. *Hail Insurance.*

See as to power to levy assessments under the Mutual Hail Insurance Act, R. S. M. C., 106: *Manitoba Farmers' Mutual Hail Insurance Co. v. Lindsay*, 21 Occ. N. 60; 13 Man. L. R. 352; *Manitoba Farmers' Mutual Hail Insurance Co. v. Fisher*, 22 Occ. N. 303; 14 Man. L. R. 157.

PART XXV.

WORKMEN'S COMPENSATION ACT, 1906.

LIABILITY OF EMPLOYERS TO WORKMEN FOR INJURIES.

Sect. 1 (1).—“ If in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as herein-after mentioned, be liable to pay compensation in accordance with the First Schedule to this Act.”

A. “In any Employment.”

There are three main headings under which the cases decided under sub-s. 1 of s. 1 may be grouped: (a) “In any Employment,” (b) “Personal Injury by Accident,” (c) “Arising Out of and in the Course of the Employment.” This present note is concerned with the first of the above groups; the others are considered *infra* under the appropriate heading.

Unlike the Act of 1897, the Workmen's Compensation Act, 1906, is not limited to particular kinds of employment, but applies to any employment in which anyone who comes within the definition of “workman” in s. 13 is engaged. To this broad proposition there are two exceptions, for the Act does not apply to—

(i.) Persons in the naval and military services of the Crown who are expressly excluded by s. 9, sub-s. (i.).

(ii.) Persons who are injured by accidents which occur outside the United Kingdom, except in the case of seamen, etc., who come within s. 7. It was so held in *Tomalin v. Pearson & Son, Ltd.* [1837] and *Schwartz v. The India Rubber, Gutta Percha and Telegraph Works Co., Ltd.* [1838].

(By the Workmen's Compensation (Anglo-French Convention) Act, 1909, the benefits of French legislation are conferred on British subjects meeting with accidents as workmen in France.)

1837.—Tomalin v. Pearson & Son, Ltd., [1909] 2 K. B. 61; 78 L. J. K. B. 863; 100 L. T. 685; 25 T. L. R. 477—C. A.

A fitter in the employment of the appellant company was sent by them to Malta to work for them in the construction of a break-water. While in Malta he was fatally injured by an accident arising out of and in the course of his employment. His widow claimed compensation under the Workmen's Compensation Act, 1906.

HELD—that the claimant was not entitled to claim compensation, inasmuch as the deceased workman did not come within the limited class of persons to whom the Workmen's Compensation Act, 1906, applies in the case of accidents happening outside the United Kingdom.

Notes.—*Darlington v. Roscoe & Sons*, [1907] 1 K. B., at p. 220 [2551], cited. *Peebles v. Oswaldtwistle Urban District Council*, [1896] 2 Q. B. 159, referred to.

1838.—Schwartz v. The India Rubber, Gutta Percha and Telegraph Works Co., Ltd., [1912] 2 K. B. 299; 81 L. J. K. B. 780; 137 L. T. 706; 28 T. L. R. 331; 5 B. W. C. C. 390; [1912] W. C. Rep. 190—C. A.

A workman in the employment of the defendants was told to proceed, at their expense, in a British ship, to Teneriffe to do work there. The ship was wrecked on the voyage, and the workman and all on board were lost. His dependants claimed compensation.

HELD—that the Workmen's Compensation Act, 1906, had no application to British ships on the high seas except in the case of seamen and apprentices within s. 7.

Notes.—*Tomalin v. Pearson & Son, Ltd.* [1837] followed.

B. "Personal Injury by Accident."

There is no definition of the word "accident" in the Act of 1906, and its meaning can therefore only be ascertained from the cases. It will be observed from the following analysis that there has been some considerable difference of opinion as to what constitutes an "accident" within the meaning of the Act.

Firstly, as to the general principles. We regard the decision of the House of Lords in *Fenton v. Thorley* [1839] as being the leading case on this part of our subject. That case finally established that the word "accident" for the purposes of the Workmen's Compensation Act, 1906, is used in the popular sense, and means "*an unlooked-for mishap or an untoward event which is not expected or designed.*" We give Lord Macnaghten's judgment in this case in full (see also *Stewart v. Wilsons and Clyde Coal Co.* [1840], expressly approved in *Fenton v. Thorley*). Previous to the decision of the House of Lords in the leading case, the Court of Appeal had been inclined to regard the word "accident" as implying something "fortuitous or unexpected." The cases of *Hensey v. White* [1841]; *Lloyd v. Sugg* [1842]; *Thompson v. Ashington Coal Co.* [1843]; *Walker v. Lilleshall Coal Co.* [1848]; *Roper v. Greenwood* [1844]; *Timmins v. Leeds Forge Co.* [1845]; *Williams v. Powell Duffryn Steam Coal Co.* [1846]; and *Boardman v. Scott* [1847], are based on this doctrine of the necessity of a "fortuitous element" to constitute an accident, and may be regarded as being overruled by *Fenton v. Thorley* in so far as they conflict with that case. They may, however, still be of some value, and so are inserted.

Secondly, as to the effect of disease. This question is one of great difficulty, but the true test would appear to be that if the disease was contracted by "accident," within the meaning of the definition in *Fenton v. Thorley*, the applicant is entitled to recover compensation, but if the injury was caused by disease alone not accompanied by accident, he will not succeed unless he is suffering from one of the industrial diseases to which s. 8 applies. Lord Dundas, in the recent decision of the Court of Session in *Drylie v. Alloa Coal Co.* [1851], applied the following test: "Death from disease—apart from the industrial diseases specially mentioned in the Act of 1906 and subsequent statutory rules and orders—is not an 'accident' unless the disease which caused death can be definitely collocated in the relation of effect to cause with some unusual, unexpected, and undesigned event arising, at an ascertained time, out of the employment." It was laid down in *Brintons v. Turvey* [1849] that "the fact that an accident causes injury in the shape of a disease does not render the cause not an accident," and this principle was followed and extended in *Ismay v. Williamson* [1852]; *Morgan v. S.S. Zenaida* [1853]; *Sheerin v. Clayton* [1854]; *Adams v. Thompson* [1855]; *Walker v. Mullins* [1856]; *Lovelady v. Berrie* [1857]; *Dotzauer v. Strand Palace Hotel* [1858], and *Kelly v. Auchenlea Coal Co.* [1859]. On the other hand, the doctrine established in *Brintons v. Turvey* must not be extended so as to hold that every disease arising out of and in the course of the employment comes within the Act. It was so held in

Broderick v. London County Council [1860]; *Eke v. Hart-Dyke* [1861], and *Martin v. Manchester Corporation* [1866]. In the last-mentioned case it was held that a man who had contracted scarlet fever was not entitled to succeed, "as he had not shown that there was a particular time, place, and circumstance by means of which the injury by accident happened." This portion of the subject has been subdivided, so as to contrast on the one hand the cases which deal with disease causing the accident, and on the other the cases dealing with diseases of gradual onset which are merely the anticipated and necessary consequence of continuous labour. The cases which fall within this latter classification are the three last-mentioned and also *M'Millan v. Singer Sewing Machine Co.* [1862]; *Brown v. Watson, Ltd.* [1863]; *M'Luckie v. John Watson, Ltd.* [1864]; *Coe v. Fife Coal Co.* [1867]; *Ritchie v. Kerr* [1868]; *Spence v. William Baird & Co.* [1869]; *O'Hara v. Hayes* [1870]; *Walker v. Hockney Bros.* [1871]; *Black v. New Zealand Shipping Co.* [1872]; *Evans v. Dodd* [1875]; *White v. Sheepwash* [1876]; *Steel v. Cammell, Laird & Co.* [1877], and *Marshall v. East Holywell Colliery Co.* [1878]. In a third subdivision are placed cases showing that if a man is suffering from a disease which becomes aggravated or accelerated by accident, he is entitled to recover. Under this heading is placed the leading case of *Clover, Clayton v. Hughes* [1879], although it also bears on the question as to whether an injury by accident arises "out of" the employment or not. It must be remembered that strong dissentient opinions were delivered by Lord Atkinson and Lord Shaw in this case, and extracts from their judgments have thus been inserted, in addition to the whole of the latter part of Lord Loreburn's judgment, which embodies the opinion of the majority of the House. *M'Innes v. Dunsmuir and Jackson* [1880]; *Trodden v. Lennard and Sons, Ltd.* [1881]; *Johnson v. S.S. Torrington* [1882], and several other cases have also been placed in this sub-division.

Thirdly, as to the effect of a former accident contributing to new incapacity. The cases of *Noden v. Galloways* [1886] and *Brown v. Kemp* [1887] are considered and other cases mentioned.

Fourthly, as to accident occasioned by assault or murder. The law on this point may still be taken to be unsettled, as the English and Irish decisions are in conflict with the view held by the Court of Session in Scotland. The Court of Appeal in England, in *Nisbet v. Rayne* [1888], held that the death of a workman, who was intentionally shot, was caused by "accident," on the ground that such an occurrence was "unexpected or undesigned" when judged from the victim's point of view. See also *Blake v. Head* [1891]. The Court of Appeal in Ireland came to a similar conclusion in *Anderson v. Balfour* [1889], but it must be noted that Cherry, L.J., delivered a strong dissentient judgment. The Court of Session in Scotland came to a contrary view in *Murray v. Denholme* [1890], in which case the decisions in *Nisbet v. Rayne* and *Anderson v. Balfour* were expressly disapproved as being contrary to Lord Macnaghten's definition in *Fenton v. Thorley*. Since this note was written the question has been settled by the House of Lords in *Kelly v. Board of Management Trim Joint District School* [2014].

Fifthly, as to burden of proof. The cases of *Barnabas v. Bersham Colliery* [1893]; *Hawkins v. Powell's Tillery Steam Coal Co.* [1894],

Browne v. Kidman [1895]; *Marshall v. Sheppard* [1896]; *Farmer v. Stafford* [1897]; *Powers v. Smith* [1898]; and *Thackway v. Conelly* [1899], show that the *onus* of proof of claim is upon the applicant, and if the cause of the injury is equally consistent with an accident and no accident, the applicant fails. But if there has been an injury in a former employment, the *onus* will be upon the employers to show that no new injury has been sustained by the workman whilst in their employment (*Borland v. Watson, Gow & Co.* [1900]).

There remain to be considered cases of unexplained injury in which it is the duty of the arbitrator to draw inferences as to whether the injury has been caused by accident or not. Under this heading are placed the cases of *Marshall v. S.S. Wild Rose* [1901]; *Howe v. Fernhill Collieries, Ltd.* [1902]; *Honor v. Painter* [1903]; *Beaumont v. Underground Electric Railways Co. of London* [1904]; *Perry v. Ocean Coal Co., Ltd.* [1905]; *Paton v. William Dixon* [1906]; *Woods v. Wilson* [1907]; *Walker v. Murrays* [1914], and other cases. These cases are purely questions of fact, to be decided by the arbitrator.

Sixthly, evidence. Statements made by a deceased workman, in the absence of his employer, are admissible in so far as they prove his bodily or mental sensations at the time, but such statements are not admissible as evidence for the purpose of proving the occasion and cause of the injury (*Gilbey v. Great Western Railway Co.* [1916]; *Amys v. Barton* [2031]; *Smith v. Hardman and Holden, Ltd.* [1917]; *Donnaghy v. Ulster Spinning Co.* [1918]), though they are admissible as evidence of notice of accident (*Hewitt v. Stanley Brothers, Ltd.* [1919]). If the arbitrator receives evidence of such a statement and there is no other evidence justifying the award, the award will be set aside (*Wolsey v. Pethick Brothers* [1920]; *Langley v. Reeve* [1921]), and a new trial may be ordered (*Smith v. Hardman and Holden, Ltd.* [1917]). The employers will not be entitled to put in evidence a statement made by the deceased as to the cause of the injury unless it is shown that the statement was to the knowledge of the deceased contrary to his pecuniary or proprietary interests (*Tucker v. Oldbury Urban District Council* [1922]). In the same case it was held that the statement was not admissible as an *admission*, as the dependants had a direct statutory right against the employer, and so no admission made by the deceased could be evidence against them. Medical certificates cannot be put in unless the doctor who gave them is called (*Richards v. Sanders and Sons* [1923]). An entry in the register of deaths proves, in the absence of the doctor, nothing as to its own correctness (*Dundee Steam Trawling Co. v. Robb* [1924]). If one of the parties sends abroad for necessary evidence, and the judge decides the case without waiting for such evidence, a new trial will be ordered (*Jessop v. Maclay* [1925]). As to the power of the arbitrator to recall a witness, see *Peters v. S.S. Argol (Owners)* [1926]). In *South Eastern and Chatham Railway Co.'s Managing Committee v. Erwell* [1927], where a material witness was not called owing to a mistake, a rehearing was ordered by consent.

Bearing in mind the above considerations, the following scheme has been employed in considering the cases which fall under the heading of "Personal Injury by Accident":—

- I. General Principles.
 - (1) Definition.
 - (2) Cases Based on the Doctrine of "Fortuitous Element" disapproved in *Fenton v. Thorley*.
- II. Disease.
 - (1) Disease Caused by Accident.
 - (2) Disease of Gradual Onset.
 - (3) Disease Accelerated by Accident.
- III. Former Accident Contributing to New Incapacity.
- IV. Accident Occasioned by Assault or Murder.
- V. Burden of Proof.
 - (1) *Onus* on Applicant.
 - (2) *Onus* on Employer.
 - (3) Drawing Inferences.
- VI. Evidence.

I. *General Principles.*(1) *Definition.*

1839.—**Fenton v. Thorley**, [1903] A. C. 443; 72 L. J. K. B. 787; 89 L. T. 314; 52 W. R. 81; 19 T. L. R. 684—H. L. (E.).

Injury by over-strain or over-exertion sustained by a man in doing his work is injury by “accident” within the meaning of the Workmen's Compensation Act, 1897.

Per Lord Macnaghten (at p. 444): “My Lords, Fenton, the appellant, was a workman in the employment of the respondents, who manufacture for sale an article called Thorley's Food for Cattle. He was employed to look after one of the machines used in preparing the food. It seems to have been a sort of combination of kettle and press. The actual operation performed by this machine takes about six to eight minutes. At the end of that time the workman in charge moves a lever and then turns a wheel for the purpose of raising the lid and removing the contents, which come out, or ought to come out, dried and pressed into separate layers of cakes.

“On December 3, 1901, Fenton was at work at his machine. He had got through the operation on that day a good many times without hitch or difficulty; but about 9 p.m., or a little later, when the time came for opening the vessel, the wheel would not turn. He then called a fellow-workman to his assistance, and the two together set to work to move the wheel. Suddenly Fenton felt something which he describes as ‘a tear in his inside,’ and it was found that he was ruptured.

“Fenton was a man of ordinary health and strength. There was no evidence of any slip, or wrench, or sudden jerk. It may be taken that the injury occurred while the man was engaged in his ordinary work, and in doing or trying to do the very thing which he meant to accomplish.

“There is evidence that the wheel was short of one spoke or handle, which may have made it more difficult to grasp than usual, and it was discovered afterwards that there was a leak in the kettle which let moisture into the vessel below, glueing its contents together, and so causing the lid to stick. I mention these circumstances merely for the purpose of putting them aside. It was, indeed, argued by the learned counsel for the appellant that, if the mishap that befell Fenton was not of itself and apart from all other circumstances an accident within the meaning of that word as used in the Act, then these two things—the loss of a spoke in the wheel and the leak in the kettle—introduced an element of accident—a fortuitous element it was called—which would satisfy the terms of the enactment, however narrowly it may be construed. In my opinion, they do not affect the question in the least.

“The Court of Appeal held that the injury which Fenton sustained was not ‘injury by accident’ within the meaning of the Act. In so holding they followed an earlier decision of the Court in the case of *Hensey v. White*, ([1900] 1 Q. B. 481 [1841]), which, in its circumstances is not distinguishable from the present case. In

Hensey v. White a passage was cited from the opinion of Halsbury, L.C., in *Hamilton, Fraser & Co. v. Pandorf & Co.* (1887), 12 App. Cas. 518, in which his Lordship said: 'I think the idea of something fortuitous and unexpected is involved in both words "peril" or "accident."' Founding themselves upon that expression, the learned judges of the Court of Appeal held in *Hensey v. White*, as they have held here, that there was no accident, because (to quote the leading judgment) there was 'an entire lack of the fortuitous element.' 'What the man was doing,' it was said, 'he was doing deliberately, and in the ordinary course of his work, and that which happened was in no sense a fortuitous event.' To the expression as used by Lord Halsbury, in the passage in which it occurs, no possible objection can be taken; but it is, I think, to be regretted that the word 'fortuitous' should have been applied to the term 'injury by accident' in the Workmen's Compensation Act.

"If it means exactly the same thing as 'accidental,' the use of the word is superfluous. If it introduces the element of haphazard (if I may use the expression), an element which is not necessarily involved in the word 'accidental,' its use, I venture to think, is misleading, and not warranted by anything in the Act.

"And now I must ask your Lordships' attention to the Act itself; but before doing so, there are two observations I should like to make.

"If a man, in lifting a weight or trying to move something not easily moved, were to strain a muscle, or rick his back, or rupture himself, the mishap in ordinary parlance would be described as an accident. Anybody would say that the man had met with an accident in lifting a weight, or trying to move something too heavy for him.

"One other remark I should like to make. It does seem to me extraordinary that anybody should suppose that when the advantage of insurance against accident at their employers' expense was being conferred on workmen, Parliament could have intended to exclude from the benefit of the Act some injuries ordinarily described as 'accidents' which beyond all others merit favourable consideration in the interest of workmen and employers alike. A man injures himself by doing some stupid thing, and it is called an accident, and he gets the benefit of the insurance. It may even be his own fault, and yet compensation is not to be disallowed unless the injury is attributable to 'serious and wilful misconduct' on his part. A man injures himself suddenly and unexpectedly by throwing all his might and all his strength and all his energy into his work by doing his very best and utmost for his employer, not sparing himself or taking thought of what may come upon him, and then he is to be told that his case is outside the Act because he exerted himself deliberately, and there was an entire lack of the fortuitous element! I cannot think that that is right. I do think that if such were held to be the true construction of the Act, the result would not be for the good of the men, nor for the good of the employers either, in the long run. Certainly it would not conduce to honesty or thoroughness in work. It would lead men to shirk and hang back, and try to shift a burthen which might possibly prove too heavy for them on to the shoulders of their comrades.

"Now I turn to the Act. The title of the Act is, 'An Act to amend the law with respect to compensation to workmen for accidental injuries suffered in the course of their employment.' It has been held that you cannot resort to the title of an Act for the purpose of construing its provisions. Still, as was said by a very sound and careful judge, 'the title of an Act of Parliament is no part of the law, but it may tend to show the object of the legislature.' Those were the words of Wightman, J., in *Johnson v. Upham* (1859), 2 E. & E. 263, and Chitty, J., observed in *East and West India Docks v. Shaw, Savill and Albion Co.* (1888), 39 Ch. D. 531, that the title of an Act may be referred to for the purpose of ascertaining generally the scope of the Act. Surely, if such a reference is ever permitted, it must be permissible in a case like this, where Parliament is making a new departure in the interest of labour, and legislating for working men, presumably in language they can understand. The 1st section of the Act, sub-s. 1, declares that 'if in any employment to which this Act applies personal injury by accident arising out of and in the course of the employment is caused to a workman,' his employers shall be liable to pay compensation. Now the expression 'injury by accident' seems to me to be a compound expression. The words 'by accident' are, I think, introduced parenthetically as it were to qualify the word 'injury,' confining it to a certain class of injuries, and excluding other classes, as, for instance, injuries by disease or injuries self-inflicted by design. Then comes the question, Do the words 'arising out of and in the course of the employment' qualify the word 'accident,' or the word 'injury,' or the compound expression 'injury by accident'? I rather think the latter view is the correct one. If it were a question whether the qualifying words apply to 'injury' or to 'accident,' there would, I think, be some difficulty in arriving at a conclusion. I find in s. 4 the expression 'accident arising out of and in the course of their employment.' In s. 9 I find the words 'personal injury arising out of and in the course of his employment,' while in s. 1, sub-s. 2 (b), the qualifying words seem to be applied to the compound expression 'injury to a workman by accident.' The truth is that in the Act, which does not seem to have had the benefit of careful revision, 'accident' and 'injury'—that is, injury by accident—appear to be used as convertible terms; for instance, in s. 2 'notice of the accident' has to be given, and that notice is referred to immediately afterwards as 'notice in respect of an injury under the Act.' I come, therefore, to the conclusion that the expression 'accident' is used in the popular and ordinary sense of the word as denoting an unlooked-for mishap or an untoward event which is not expected or designed.

"It would serve no useful purpose to review the English cases on the subject. The decisions before *Hensey v. White* are curiously conflicting. It would seem almost as if the Court, in some cases at least, simply confirmed the finding of the county court judge as a finding of fact, however opposed the finding might be to a previous decision of the Court on facts precisely similar. With the decision in *Hensey v. White*, and the decisions in which that case has been followed, including *Roper v. Greenwood* (83 L. T. N. S. 471 [1944]), speaking with all deference, I am unable to agree.

"There is, however, a recent decision of the Court of Session in

Scotland to which I should like to call your Lordships' attention, and in which I agree entirely. It is the case of *Stewart v. Wilsons and Clyde Coal Co., Ltd.* (5 F. 120 [1840]). A miner strained his back in replacing a derailed coal hutch. The question arose, Was that an accident? All the learned judges held that it was. True, two of the learned judges expressed an opinion that it was 'fortuitous,' but they could not have used that expression in the sense in which it was used in *Hensey v. White*. What the miner did in replacing the hutch he certainly did deliberately and in the ordinary course of his work. There was nothing haphazard about it. Lord M'Laren observed that it was impossible to limit the scope of the statute. He considered that 'if a workman in the reasonable performance of his duties sustains a physiological injury as the result of the work he is engaged in,' . . . 'this is accidental injury in the sense of the statute.' Lord Kinnear observed that the injury was 'not intentional' and that 'it was unforeseen.' 'It arose,' he said, 'from some causes which are not definitely ascertained, except that the appellant was lifting hutches which were too heavy for him. 'If,' he added, 'such an occurrence as this cannot be described in ordinary language as an accident, I do not know how otherwise to describe it.'

The learned counsel for the respondents, in his able address, referred to several cases on policies of insurance intended to cover injuries described either as arising from accidental, violent, and external causes, or in somewhat similar terms. I do not think that these cases throw much light upon the present question. They turn on the meaning and effect of stipulations for the most part carefully framed in the interest of the insurers. But on the whole they do not, I think, make against the construction which I ask your Lordships to put on the word 'accident' in the Workmen's Compensation Act. I will not trouble your Lordships by going through the cases which Mr. Powell cited. I will only refer to one, *United States Mutual Accident Association v. Barry* (131 U. S. 100, 121), a case of considerable authority, for it was a case in the Supreme Court of the United States. A jury found in favour of the assured, who had injured himself fatally in jumping off a platform some four or five feet high. There was a motion for a new trial on the ground of misdirection. The Court refused to disturb the verdict. In the course of the judgment two cases were referred to with approval as supporting the conclusion at which the Court arrived. One was an English, the other an American case. I give them both as stated in the judgment. 'In *Martin v. Travellers' Insurance Co.* ((1859), 1 F. & F. 505 [1679]),' said the learned judge who delivered the opinion of the Court 'the policy was against any bodily injury resulting from any accident or violence, "provided the injury should be occasioned by any external or material cause operating on the person of the insured." In the course of his business he lifted a heavy burden and injured his spine. It was objected that he did not sustain bodily injury by reason of an accident. The plaintiff recovered. In *North America Insurance Co. v. Burroughs* ((1871), 69 Penn. St. 43), the policy was against death in consequence of accident, and was to be operative only in case the death was caused solely by an accidental injury. It was held that an accidental strain resulting in death was an accidental injury within the meaning of the policy, and that it included

death from any unexpected event happening by chance and not occurring according to the usual course of things.'

"My Lords, I have no doubt that in the present case the county court judge ought to have found in favour of the appellant, if he had not been compelled to decide the other way by recent decisions in the Court of Appeal. I move, your Lordships, that the decision of the Court of Appeal and of the county court judge be reversed with costs in both courts, and that the action be remitted to the county court with a direction to the judge to ascertain the amount of compensation to which the appellant is entitled. The costs here will follow the rule laid down for pauper appeals."

Notes.—This unanimous decision of the House of Lords (Lords Macnaghten, Shand, Davey, Robertson and Lindley) is of the greatest importance, since it clearly decided that the word "accident," for purposes of workmen's compensation, is used in the popular and ordinary sense, and means *an unlooked-for mishap or an untoward event which is not expected or designed*. Until the above decision cases of rupture and strains had been held not to be within the meaning of the Act of 1897, unless they could be traced to something in the nature of a blow or fall. The following decisions on this point were fully considered in *Fenton v. Thorley*, and disapproved: *Hensey v. White* [1841]; *Roper v. Greenwood* [1844], and may now be regarded as being overruled. As will be seen from the judgment of Lord Macnaghten, in this case the decision in *Stewart v. Wilsons and Clyde Coal Co.* [1840], was expressly approved. *Hamilton, Fraser & Co. v. Pandorf & Co.* (1887), 12 App. Cas. 518; *Johnson v. Upham* (1859), 2 E. & E. 263; *East and West India Docks v. Shaw, Savill and Albion Co.* (1888), 39 Ch. D. 531; *Martin v. Travellers' Insurance Co.* (1859), 1 F. & F. 505 [1679]; *Hoddinott v. Newton, Chambers & Co.*, [1901] A. C. 49, at p. 68 [2854]; *Grill v. General Iron Screw Colliery Co.* (1866), L. R. 1 C. P. 611; *Siordet v. Hall* (1828), 4 Bing. 607, and the American cases of *United States Mutual Accident Association v. Barry*, 13 I. U. S. 100, 121; *North American Insurance Co. v. Burroughs* (1871), 69 Penn. St. 43, referred to.

1840.—*Stewart v. Wilsons and Clyde Coal Co.* (1902), 5 F. 120; 40 Sc. L. R. 80—Ct. of Sess.

A workman while engaged in the course of his employment in replacing a derailed coal hutch on the rails severely strained his back.

HELD—that he had been injured by an "accident" within the meaning of the Act.

Notes.—In his judgment in this case Lord Adam said: "I am not going to attempt to define the word 'accident,' but it humbly appears to me perfectly clear that the appellant's injuries were, in the circumstances stated, the result of an accident. These injuries were not such as would occur in the ordinary course of work, but were fortuitous and unexpected. Suppose, for instance, that instead of straining his back he had broken his leg, would anyone say that that was not an accident? I am unable to see any difference between the two cases, and why an injury by strain should not fall within th

same category as an injury by the fracture of a bone." The decision in this case was approved of by Lord Macnaghten and Lord Lindley, in *Fenton v. Thorley* [1839].

(2) *Cases Based on the Doctrine of "Fortuitous Element" disapproved in Fenton v. Thorley.*

1841.—Hensey v. White, [1900] 1 Q. B. 481 ; 69 L. J. Q. B. 188 ; 81 L. T. 767 ; 48 W. R. 257 ; 63 J. P. 804 ; 16 T. L. R. 64—C. A.

The word "accident" in s. 1, sub-s. 1, involves the idea of something fortuitous or unexpected.

1842.—Lloyd v. Sugg & Co., [1900] 1 Q. B. 481 ; 69 L. J. Q. B. 190 ; 81 L. T. 768 ; 48 W. R. 257 ; 16 T. L. R. 65—C. A.

A workman employed as a smith at the engineering works of the appellants was holding a flatter on an anvil for a fellow-workman to strike the flat end of the flatter. The fellow-workman made a bad stroke and struck the rod, or round part of the flatter, and jarred the workman's hand, causing it to swell and bringing on gout in the hand. The workman had previously been attended for gout in the hand and elbow by a doctor, who was of opinion that the swollen hand was caused by gout brought on by the jar, and who also certified that the workman was suffering from a weak hand caused partially by the injury.

HELD—that the injury to the workman was caused by an "accident," and that the provisions of s. 1 of the Workmen's Compensation Act, 1897, applied so as to entitle the workman to recover compensation under the Act.

1843.—Thompson v. Ashington Coal Co. (1901), 84 L. T. 412 ; 65 J. P. 356 ; 17 T. L. R. 345—C. A.

A miner was employed in hewing coal, and while so employed a piece of coal worked itself into his knee, with the result that blood poisoning set in and the workman died.

HELD—that his death was the result of an "injury by accident," within s. 1 of the Workmen's Compensation Act, 1897.

1844.—Roper v. Greenwood (1900), 83 L. T. 471—C. A.

A woman who was employed as a box maker was ordered to work upon boxes which were larger and heavier than those upon which she had previously worked. When she had finished some of the boxes and was working upon another, she suffered internal injury from the strain of the unusual exertion. The county court judge found that the injury did not arise from an "accident" within the meaning of s. 1, sub-s. 1, of the Workmen's Compensation Act, 1897.

HELD—that the judge had properly found that the injury did not arise from an "accident" within the meaning of the Act.

1845.—Timmins v. Leeds Forge Co. (1900), 83 L. T. 120 ; 16 T. L. R. 521—C. A.

A workman was employed by the defendants in the work of lifting and removing planks from a stack of timber. One night there was rain and frost, and the planks became frozen together, the planks lower in the stack being more firmly frozen together than those above ; on the next day the workman began the work in the morning, and lifted and removed planks all day ; about 4 p.m., while trying to lift a plank, he ruptured himself. The workman claimed compensation under the Workmen's Compensation Act, 1897, and the county court judge found that the injury was caused by the lifting of the plank, and was an injury by "accident" within the meaning of the Act.

HELD (dismissing the appeal)—that there was evidence of something fortuitous and unexpected upon which the county court judge might properly find that the injury was caused by "accident" within the meaning of the Act.

1846.—Williams v. Powell Duffryn Steam Coal Co. (1902), 113 L. T. J. 196—C. A.

Where in a mine a truck had left the line, and a man called up to assist injured himself in replacing it, it was held the fortuitous and unexpected element existed on the sudden emergency, and, the whole matter being one transaction, the man was injured by "accident."

1847.—Boardman v. Scott, [1902] 1 K. B. 43 ; 71 L. J. K. B. 3 ; 85 L. T. 502 ; 50 W. R. 184 ; 66 J. P. 260 ; 18 T. L. R. 57—C. A.

A workman in normal health was engaged in the course of his duty in removing a beam from a loom. He was in the act of lifting the beam on to his shoulder when, finding it was not evenly balanced, he gave it an extra lift, or hitch up, and in doing so ruptured several fibres of the muscles of his back, which incapacitated him for work.

HELD—that he had sustained personal injury by "accident" within the meaning of s. 1 of the Workmen's Compensation Act, 1897.

1848.—Walker v. Lilleshall Co., [1900] 1 Q. B. 481 ; 69 L. J. Q. B. 192 ; 81 L. T. 769 ; 48 W. R. 257 ; 64 J. P. 85 ; 16 T. L. R. 108—C. A.

A workman, having a blistered finger, was handling oil and red lead in the ordinary course of his employment, and, in so doing, failed to keep the red lead from the blistered finger, which accordingly became inflamed and was seriously injured.

HELD—that he had not suffered any injury by "accident" within the rule laid down in *Hensey v. White*, 69 L. J. Q. B. 188.

Notes.—This decision is now of little value since *Hensey v. White* [1841] has been overruled by *Fenton v. Thorley* [1839]. This case

would now come under s. 8 of the Act of 1906. See *infra*, p. 1072.

II. *Disease.*

N.B.—Sect. 8 of the Act ranks certain diseases, if caused in certain ways, as accidents for the purposes of the Act.

These should be borne in mind when considering the cases which follow, though, of course, the cases are concerned with diseases other than those under s. 8.

(1) *Disease Caused by Accident.*

1849.—**Brintons, Ltd. v. Turvey**, [1905] A. C. 230 ; 74 L. J. K. B. 474 ; 92 L. T. 578 ; 53 W. R. 641 ; 21 T. L. R. 444—H. L. (E.).

A workman who died of anthrax contracted from the wool on which he was working held to have died from an “accident arising out of and in the course of” his employment, within the meaning of the Workmen’s Compensation Act, 1897 (Lord Robertson *diss.*).

Notes.—*Fenton v. Thorley*, [1903] A. C. 443 [1839], discussed. In considering this case reference should be made to the judgment of Lord Lindley ([1905] A. C., at pp. 237, 238), where his Lordship said : “I hope that the decision in this case will not be regarded as involving the doctrine that all diseases caught by a workman in the course of his employment are to be regarded as accidents within the meaning of the Workmen’s Compensation Act. In this case your Lordships have to deal with death resulting from disease caused by an injury which I am myself unable to describe more accurately than by calling it purely accidental. The fact that an accident causes injury in the shape of a disease does not render the cause not an accident. Whether in any particular case an injury in the shape of disease is caused by an accident or by some other cause depends on the circumstances of that case, and on the meaning to be attributed to the word accident.”

1850.—**Higgins v. Campbell and Harrison, Ltd.** [1904] 1 K. B. 328 ; 90 L. T. 611—C.A.

A wool-sorter contracted anthrax, caused by a germ from the wool getting in a pimple on his neck.

HELD—the disease was caused by “accident.”

Notes.—This case was tried by the Court of Appeal together with *Brintons v. Turvey* [1849].

1851.—**Drylie v. Alloa Coal Co.**, [1913] S. C. 549 ; 50 Sc. L. R. 350 ; [1913] W. C. & I. Rep. 213 ; 6 B. W. C. C. 398—Ct. of Sess.

During the working time in a coal pit, which was a wet pit, water began to accumulate owing to a defect in the pump ; and the pump being stopped for repair, the water accumulated still further. When the miners found the water rising they decided to leave the pit, and hastened to the pit bottom, where they were kept waiting for twenty

minutes, during which time they were severely chilled by the water, which rose to their knees, and by exposure to the current of cold air descending the shaft. One of these miners on reaching the pit head lingered there for at least twenty minutes, and on arriving at his home complained of chill, and next day suffered from a cough, hoarseness, and pains, but went to his work. After several days—on three of which he worked at the pit—he was found to be suffering from pneumonia, of which he ultimately died.

HELD (Lord Salvesen *diss.*)—that the occurrence in the mine on the day in question was an “accident,” and that there was evidence on which the arbitrator might competently find that the deceased’s pneumonia was due to that occurrence.

Notes.—This case is of great importance, as it is the first case in which an arbitrator in Scotland has decided that a death which resulted from pneumonia ensuing on a neglected cold was a death resulting from injury by “accident.” The case came before a court of seven judges, all of whom expressed agreement with the judgment of Lord Dundas except Lord Salvesen, who delivered a strong dissentient judgment. In his judgment Lord Dundas said: “The words ‘accident’ and ‘personal injury by accident’ occurring in the Act of 1906 and the earlier Act of 1897 have been frequently interpreted and applied by the courts, and particularly by the House of Lords. In *Murray v. Denholme* [1890] I took occasion to examine with some care the pronouncements of the House upon this point, and I refer to my observations without repeating them. The guiding rules laid down by Lord Macnaghten in *Fenton v. Thorley* [1839], and again in *Clover, Clayton & Co. v. Hughes* [1879], and since then repeatedly adopted and reaffirmed by the House of Lords, would seem to be simple and clear enough to follow; but, as many subsequent decisions testify, it has not always been found easy to apply them consistently and satisfactorily to the manifold and varying circumstances which are constantly brought before the courts. In a recent Irish case, not unlike the present, in some respects, where the applicants were successful, the Lord Chancellor (Sir Samuel Walker) observed that ‘the word “accident” has, where used in this statute, long ceased to have the meaning the man in the street would attribute to it’ (*Sheerin v. Clayton & Co.* [1854]). But I think one may postulate, as a result of all the decisions, that you must have a definite ‘accident’ of some sort—not necessarily an occurrence extraneous to the workman—involving something unusual, unexpected, and undesigned, to which the injury or death can be unequivocally—or at least, by a reasonably inferred train of causation in fact—attributed; and also, probably as a corollary, that death from disease, apart from the industrial diseases specially mentioned in the Act of 1906 and subsequent statutory rules and orders—is not an ‘accident’ unless the disease which caused death can be definitely collocated in the relation of effect to cause with some unusual, unexpected, and undesigned event arising, at an ascertained time, out of the employment. Examples of an ‘accident’ where there was no ‘extraneous occurrence’ are seen in *Fenton* [1839]; *Clover, Clayton & Co.* [1879]; and *M’Innes v. Dunsmuir and Jackson* [1880]. The necessity for a sufficient train of causation in

fact, though not necessarily as matter of natural or probable sequence, is illustrated, *e.g.*, in *Malone v. Cayzer, Irvine & Co.* [2561]; *Dunham v. Clare* [2560]; and *Ystradowen Colliery Co., Ltd. v. Griffiths* [2595]. Cases in which death from disease was held to have been caused, or sufficiently contributed to, by personal injury by accident are found in, *e.g.*, *Brintons, Ltd. v. Turvey* [1849]; *Dunnigan v. Cavan and Lind* [2562] and *Kelly v. Auchenlea Coal Co., Ltd.* [1859]; while a contrary result is illustrated, *e.g.*, by *Eke v. Hart-Dyke* [1861]; *Steel v. Cammell, Laird & Co., Ltd.* [1877] and *Broderick v. London County Council* [1860].” After examining the case of *Kelly v. Auchenlea Coal Co., Ltd.* (*supra*), Lord Dundas continued: “If *Kelly’s Case* was rightly decided, as I think it was, it seems to carry the respondents here a long way towards success. The circumstance of Drylie finding himself immersed to the knees in icy-cold water was abnormal; it, in its turn, was, as a matter of fact, due to an abnormal cause—the stopping of the pump while men were at work in the pit; and, if the pneumonia of which he died was in fact caused by his immersion, I think the elements of an ‘accident’ are here present. That the immersion and its consequences arose out of, as well as in the course of, his employment, seems clear enough. . . . I am keenly alive to the kind of danger which the Lord President has more than once alluded to when he spoke of the driving force of step-by-step decisions towards an ultimate point un contemplated at the outset. But I do not think the present case, if determined as I think it should be, would mark any new departure in decision; and I take it that the court will always find grounds for calling a halt when they are invited to proceed to extreme and unreasonable conclusions (compare *McMillan v. Singer Co., Ltd.* [1862] and *Spence v. William Baird & Co., Ltd.* [1869]). The present case could never be fairly cited in the future as indicating that the court is willing to hold that a mere ordinary disease (*e.g.*, pneumonia) entitles a workman to compensation; the court must be satisfied—or be able to say that an arbitrator had not, on the facts, ground on which he might reasonably be satisfied—that the disease was attributable to some particular event or occurrence of an unusual and unexpected character, incidental to the employment, which could, in the light of the decisions, be fairly described as an accident.” The following cases were also referred to: *In re Etherington and the Lancashire and Yorkshire Accident Insurance Co.* [1682]; *Euman v. Dalziel* [2570].

1852.—Ismay, Imrie & Co. v. Williamson, [1908] A. C. 437; 77 L. J. P. C. 107; 99 L. T. 595; 24 T. L. R. 881; 52 S. J. 713—H. L. (Ir.).

The respondent’s husband, while at work in a ship’s stokehole raking out ashes from a furnace, fell in a faint, the result of heat-stroke, was carried to hospital, and died shortly afterwards. At the time of the heatstroke he was in an emaciated condition owing to lack of nourishment and exposure previous to his employment.

HELD (Lord Macnaghten *diss.*)—that the death arose from “accident arising out of and in the course of the employment.”

Notes.—*Fenton v. Thorley*, [1903] A. C. 443 [1839], and *Brintons*

v. Turvey [1849], applied. The passage in Lord M'Laren's judgment in *Stewart v. Wilsons and Clyde Co.*, 5 F. 120 [1840], "if a workman in the reasonable performance of his duties sustains a physiological injury as the result of the work he is engaged in, this is an accidental injury in the sense of the statute," cited with approval. Lord Macnaghten delivered a strong dissentient judgment on the ground that it was not "personal injury by accident," the death, in his opinion, being "due to the physical state of the workman, and 'the nature' of the employment. It was not an injury by accident in the ordinary sense of the expression, it was just what anybody would have expected who saw the man and knew what a trimmer had to do."

1853.—*Morgan v. Zenaida Steamship* (1909), 25 T. L. R. 446—C. A.

The applicant, an ordinary seaman, while engaged in painting the vessel when she was lying at a port on the coast of Mexico, was incapacitated by sunstroke.

HELD—that his injury arose by "accident" within the meaning of the Workmen's Compensation Act, 1906, and that he was entitled to compensation.

Notes.—*Ismay, Imrie & Co. v. Williamson*, [1852] *Andrew v. Failsforth Industrial Society*, [1904] 2 K. B. 32 [2021], followed. See also *Robson, Eckford & Co., Ltd. v. Blakey*, 49 S. L. R. 254 [2028].

1854.—*Sheerin v. Clayton*, [1910] 2 Ir. R. 105—C. A.

A workman employed in cleaning a mill race caught a sudden chill caused by immersion in the water. Acute inflammation of the kidneys supervened, and he died within eight days. The medical evidence proved that the attack could only have been brought on, and death result, by the exposure to cold water, and in no other way.

HELD—that the death was caused by an accident within the meaning of the Workmen's Compensation Act, 1906.

Notes.—*Ismay, Imrie & Co. v. Williamson* [1852] applied.

1855.—*Adams v. Thompson* (1911), 5 B. W. C. C. 19—C. A.

Whilst a dock labourer was unloading a cargo of bran, some of the bran blew into his eye. There was grit in the bran, and this, by his constantly rubbing his eye, produced an abrasion of the cornea. In the end his eye had to be removed. The county court judge found that the injury was due to an "accident" within the Act.

HELD—there was evidence to support the finding.

1856.—*Walker v. Mullins* (1908), 42 Ir. L. T. 168; 1 B. W. C. C. 211—C. A. (Ir.).

A gardener while digging in his employer's garden, was injured by a nail piercing his foot through his boot. He subsequently

contracted and died of tetanus through the germ which causes that disease passing into the wound in his foot. It was found that persons working in stables and gardens were peculiarly subject to contract this disease, if suffering from any wound, and that the tetanus germ entered the wound whilst the gardener was doing his gardening work.

HELD (supporting the award of the Recorder of Dublin)—that the workman had met his death by “accident arising out of and in the course of his employment” within the meaning of the Act.

1857.—Lovelady v. Berrie (1909), 2 B. W. C. C. 62—C. A.

A healthy and steady workman was employed to pick up cotton waste on the decks of a ship in dock. At 1 p.m. he was sent to work in No. 6 hold; at 3 p.m. he climbed up the ladder of the hold, apparently in great pain, and he was sent home. He was medically attended, and marks were found on his ribs; three days later he developed pneumonia, from which he died. The doctor who attended him attributed the pneumonia to the injury to his sides.

HELD—there was evidence that the workman had died from “personal injury by accident arising out of and in the course of the employment.”

1858.—Dotzauer v. Strand Palace Hotel, Ltd. (1910), 3 B. W. C. C. 387—C. A.

A scullion at an hotel was the subject of a disease (erythromelalgia) affecting his skin and making it abnormally sensitive. On the day he commenced work he washed up crockery for a number of hours in a tank containing hot water, soft soap, and caustic soda. His hands became greatly inflamed, his nails came off, and he was disabled for a long time.

HELD—that this was an “injury by accident” within the meaning of s. 1 of the Workmen’s Compensation Act, 1906.

Notes.—*Ismay, Imrie & Co. v. Williamson* [1852] followed; *Craske v. Wigan*, [1909] 2 K. B. 635 [2030], distinguished.

1859.—Kelly v. Auchenlea Coal Co., Ltd., [1911] S. C. 864; 48 Sc. L. R. 768; 4 B. W. C. C. 417—Ct. of Sess.

A miner employed in a mine in the course of his work fired a shot of gunpowder, and about three minutes after the explosion returned to the working place when it was still full of smoke. He subsequently died from pneumonia, caused by the inhalation of carbon monoxide gas generated by the explosion. It was found proved that this gas was generated by the combustion of gunpowder in varying proportions depending on the ventilation, that similar blasting operations were of daily occurrence, and that on previous occasions the deceased had suffered from headache and nausea caused by the gas.

HELD—that the miner’s death resulted from an “accident” within the meaning of the Workmen’s Compensation Act, 1906.

Notes.—Lord Kinnear, after discussing the judgments in *Fenton v. Thorley*, [1903] A. C. 443 [1839]; *Ismay, Imrie v. Williamson*, [1852]; *Steel v. Cammel, Laird & Co.*, [1877]; and *Broderick v. London County Council*, [1860] said “taking the four cases together, I think that what we have got to inquire into is whether, on the facts as stated by the learned sheriff, there was any element of the unforeseen or the unexpected in the occurrence of the event which caused the injury. I think there was evidence before the sheriff on which he might hold that there was.”

(2) *Disease by Gradual Onset.*

1860.—*Broderick v. London County Council*, [1908] 2 K. B. 807; 77 L. J. K. B. 1127; 99 L. T. 569; 24 T. L. R. 822—C. A.

A workman employed in a sewer who has contracted enteritis from inhaling poisonous sewer gas has not suffered an “injury by accident arising out of and in the course of his employment” within the meaning of s. 1, sub-s. 1, of the Workmen’s Compensation Act, 1906, so as to entitle him to compensation under that Act.

Notes.—The Master of the Rolls pointed out in his judgment, [1908] 2 K. B., at p. 810, that the doctrine of *Brintons v. Turvey*, [1905] A. C. 230 [1849], the anthrax case, was not to be so extended as to hold that every disease arising out of and in the course of the employment fell within the Act (*Steel v. Cammel, Laird & Co.*, [1905] 2 K. B. 232 [1877], applied; *Fenton v. Thorley*, [1903] A. C. 443 [1839], referred to).

1861.—*Eke v. Hart-Dyke*, [1910] 2 K. B. 677; 80 L. J. K. B. 90; 103 L. T. 174; 26 T. L. R. 613; 3 B. W. C. C. 482—C. A.

Except in the case of the industrial diseases, to which by s. 8 the provisions of the Act are to apply, unless the applicant can indicate the time, the day, and circumstance and place in which the accident has occurred by means of some definite event, a disease cannot be treated as a personal “injury by accident” within s. 1, sub-s. 1, of the Act, and the applicant is not entitled to compensation.

In July, 1909, a gardener and labourer and caretaker was ordered by his employer to open certain cesspools for the purpose of inspection, and was engaged in such work on four or five different days. Early in August he became unwell, and on August 23rd saw a doctor, who thought he was suffering from the smell of paint. In September another doctor saw him and considered that he was affected with sewer gas poisoning. He died on October 30th, 1909, but no notice was given to his employer until December 30th. His widow took proceedings for compensation. The application for arbitration gave no date as to when the alleged accident occurred. It was admitted that the man’s disease was obscure. The county court judge found that it was not possible to give any particular day as the date of the accident, but he decided that the man died from poisoning contracted whilst working on the cesspools, and that the employer was not prejudiced in his defence by want of notice; and he awarded compensation.

HELD—that the second limb of proviso (a) in sub-s. 1 of s. 2 of the Act of 1906 had nothing to do with the prejudice caused to the employer by the want of notice, which was dealt with in the first limb, but said that the want of notice should not be a bar to proceedings for compensation if such want was occasioned by a reasonable cause; and that under the circumstances there was “reasonable cause” for not giving the notice.

HELD FURTHER (Kennedy, L.J., doubting) that there had not been an “accident” within the meaning of the Act, that the county court judge’s finding was not sufficient to support his decision, and that consequently no compensation was payable.

Notes.—*Brintons, Ltd. v. Turvey*, [1905], A. C. 230 [1849], distinguished; *Broderick v. London County Council* [1860], explained; *Ismay, Imrie & Co. v. Williamson*, [1908] A. C. 437, at p. 441 [1852]; *Steel v. Cammell, Laird & Co.*, [1905] 2 K. B. 232 [1877], referred to.

1862.—*M’Millan v. Singer Sewing Machine Co.*, [1913] S. C. 346; 50 Sc. L. R. 220; 6 B. W. C. C. 345; [1913] W. C. & I. Rep. 70—Ct. of Sess.

A collector and canvasser, who had contracted pleurisy, claimed compensation from his employers, averring that in order to finish his work timeously one day he had to over-exert himself in climbing the stairs of a tenement; that he became “sweated” and contracted a chill which developed into pleurisy, and that he thus sustained an accident in the course of his employment. The arbitrator, without allowing a proof, dismissed the application as irrelevant, holding that the workman had failed to aver an “accident” within the meaning of the Act.

HELD—that the arbitrator was right.

Note.—*Eke v. Hart-Dyke* [1861], referred to with approval.

1863.—*Brown v. Watson, Ltd.*, [1913] S. C. 593; 50 Sc. L. R. 415; 6 B. W. C. C. 416; [1913] W. C. & I. Rep. 223—Ct. of Sess.

During the working time in a coal pit the miners, owing to a wreck in the shaft of the mine, were ordered to ascend to the surface, and proceeded, in obedience to instructions, to the down-cast shaft, where they were compelled to wait at a mid-landing for an hour and a half. During this period the miners, who had been sweating at their work, were exposed to a very strong draught from the air passing down the shaft for the ventilation of the mine, and on reaching the surface one of them complained of a chill. On this chill pneumonia supervened, and resulted in the death of the miner:

HELD—that there was no evidence on which it could competently be found that the deceased’s death was due to an “injury by accident.”

Notes.—*Drylie v. Alloa Coal Co.* [1851] distinguished. Lord Dundas, in contrasting the present case with *Drylie’s Case*, said: “What appears to me to make the cases absolutely different is this, that in the one case the men were exposed to something which was

entirely different from anything that they ever had to encounter in the pit before, whereas in this case there was nothing of that kind at all."

1864.—*McLuckie v. John Watson, Ltd.*, [1913] S. C. 975; 50 Sc. L. R. 770; [1913] W. C. & I. Reps. 481—Ct. of Sess.

A miner, in order that he might be among the first to ascend the shaft, stood in an accumulation of water at the pit bottom for some thirty minutes instead of waiting on dry ground till his turn to ascend came. Had he waited he might have reached the cage comparatively dry. In consequence of standing in the water he contracted a chill, on which deafness followed, rendering him totally unfit for work.

HELD—that the workman's incapacity was not due to an "injury by accident" in the sense of the Workmen's Compensation Act, 1906.

Notes.—*Drylie v. Alloa Coal Co.*, [1913] S. C. 549 [1851], distinguished, *per* the Lord President, on the ground that in that case "the pit was flooded through an accident, and was flooded to such an extent that the men thought they were in danger of th lives, and rushed to the pit bottom in order to get up to the surface—not at the ordinary time and in the ordinary course of their business, but as they thought, in order to escape from drowning." *Eke v. Hart-Dyke* [1861] referred to.

1865.—*Swinbank v. Bell Brothers, Ltd.* (1911), 5 B. W. C. C. 48—C. A.

A workman knocked his elbow at work, and afterwards suffered from eczema in the forearm. On medical evidence the judge found that the eczema was not caused by the knock, and awarded for the employers.

HELD—there was evidence to support the finding.

1866.—*Martin v. Manchester Corporation*, [1912] W. N. 105; 106 L. T. 741; 76 J. P. 251; 28 T. L. R. 344; 5 B. W. C. C. 259; [1912] W. C. Rep. 289—C. A.

A workman is not entitled to recover compensation under the Workmen's Compensation Act, 1906, unless he can satisfy the court of the particular time, place, and circumstances in which the injury by accident alleged by him happened.

The applicant was employed as a porter at a scarlet fever hospital, and among his duties was that of cleaning out the mortuary. He had an attack of influenza in February, 1911, and returned to work on March 22nd. On April 1st, and for some days previous to that date, he was out and in the fever ward, and on April 1st he cleaned out the mortuary. There was no proof that at the time there was in the mortuary any dead body of a person who had died of scarlet fever. Three days later the applicant was found to be suffering from scarlet fever which incapacitated him for work. On a claim by him for compensation, the county court judge found that the applicant

contracted fever on April 1st in the mortuary, and that this was an injury by accident within the Workmen's Compensation Act, 1906.

HELD—that there was no evidence to support the finding, and that as the applicant had not shown that there was a particular time, place, and circumstance, by means of which the “injury by accident” happened, he was not entitled to an award.

Notes.—*Broderick v. London County Council* [1860] and *Eke v. Hart-Dyke* [1861] followed.

1867.—*Coe v. Fife Coal Co.*, [1909] S. C. 393; 46 Sc. L. R. 325—Ct. of Sess.

A miner, while engaged in holding back a hutch which was being wheeled down a gradient, felt a severe pain in his chest and sat down, saying that he thought he had jerked himself. He worked on four out of the following eleven days, but became then totally incapacitated. For a period prior to the date on which he felt the pain he had been engaged wheeling hutches, and the cause of his incapacity was cardiac breakdown due to the fact that the work in which he had for some days been engaged was too heavy for him. He was not injured by any sudden jerk, but the repeated excessive exertion strained his heart unduly, until finally it was overstrained. The arbitrator, with the assistance of the medical referee as assessor, held that the injury was not “injury by accident” within the meaning of the Workmen's Compensation Act, 1906.

HELD (on appeal)—that there was no ground for altering the arbitrator's decision.

Notes.—The Lord President, in his judgment, said: “I confess frankly that I have found the case to be one of great delicacy and difficulty, because it is one of those cases, with which one is not unfamiliar in the law, where one seems almost driven by the course of decisions, each of which gradually goes a little further than the one which preceded it, until at last you reach a point which when the first decision was given was probably not contemplated.” Lord Kinnear, in his judgment, in reviewing the various interpretations placed on the word “accident” in the judgments in *Fenton v. Thorley* (*post*), said: “It seems to me that all these interpretations of the word point to some particular event or occurrence which may happen at an ascertainable time, and which is to be distinguished from the necessary and ordinary effect upon a man's constitution of the work in which he is engaged day by day. So defined the word ‘accident’ seems to me to exclude the anticipated and necessary consequence of continuous labour.” *Fenton v. Thorley*, [1903] A. C. 443 [1839], discussed. *Stewart v. Wilsons and Clyde Coal Co.*, 5 F. 120 [1840]; *Ismay, Imrie & Co. v. Williamson*, [1908] A. C. 437 [1852]; *Brintons v. Turvey*, [1905] A. C. 230 [1849], referred to.

1868.—*Ritchie v. Kerr*, [1913] S. C. 613; 50 Sc. L. R. 434; 6 B. W. C. C. 419; [1913] W. C. & I. Rep. 297—Ct. of Sess.

In an arbitration under the Workmen's Compensation Act, 1906, the arbitrator found that a farm labourer, apparently in good health, died suddenly while engaged, in the course of his ordinary work,

in lifting baskets of corn to feed a bruising machine ; that the cause of death was "failure of the heart" ; and that "a contributing cause of the failure of the heart's action was the strain arising from the exertion made by the deceased in repeatedly stooping to fill the basket with corn and then lifting it when full up to the level of his shoulders in order to feed the bruiser."

HELD—that there were no facts stated from which the arbitrator could competently infer that the death was due to "injury by accident" within the meaning of the Workmen's Compensation Act, since there was no particular event or occurrence to which the death could be attributed.

Notes.—*Clover, Clayton & Co. v. Hughes*, [1910] A. C. 242 [1879], distinguished. *Beaumont v. Underground Electric Railway Co., Ltd.* [1904] and *Coe v. Fife Coal Co.* [1867] referred to with approval and applied. *Fenton v. Thorley* [1839] and *Stewart v. Wilsons and Clyde Coal Co.* [1840] referred to.

1869.—*Spence v. William Baird & Co., Ltd.*, [1912] S. C. 343 ; 49 Sc. L. R. 278 ; 5 B. W. C. C. 542 ; [1912] W. C. Rep. 18—Ct. of Sess.

In arbitration proceedings to recover compensation under the Workmen's Compensation Act, 1906, the arbiter found as facts that the claimant, while in the course of his employment lifting a derailed hutch, felt a sharp pain near the heart, followed by palpitation and shortage of breath, and that on being examined the claimant was found to be suffering from advanced disease of the heart, which was of long standing, was in its nature progressive, and bound to manifest itself sooner or later ; and thereupon held that it was not proved that the lifting of the hutch accelerated the disease.

HELD—that the arbiter was entitled to find that the claimant had not proved that he had sustained an "accident arising out of and in the course of his employment" within the meaning of the statute.

Notes.—Lord Dundas in his judgment pointed out that there is a very real danger of the court going too far in this kind of case, and cited the passage in the judgment of the Lord President in the case of *Coe v. Fife Coal Co.*, [1909] S. C. 393, at p. 396 [1867], when he referred to a situation "where one seems almost driven by the course of decisions, each of which gradually goes a little further than the one which preceded it, until at last you reach a point which, when the first decision was given, was probably not contemplated." *Clover, Clayton & Co. v. Hughes*, [1910] A. C. 242 [1879], distinguished, as "the facts there were not the same as the facts here ; and it is important to observe that the decision of the majority (and it was a very narrow majority) was expressly put upon the view that there was evidence upon which the learned county court judge, upon a conflict of evidence, was entitled to hold as he did in favour of the workman. That view is not applicable here."

1870.—*O'Hara v. Hayes* (1910), 44 I. L. T. 71 ; 3 B. W. C. C. 586—C. A. (Ir.).

A workman who had been suffering for some years from progressive heart disease became faint while hurrying to a railway station

with a parcel weighing 17 lbs., for his employer, and died shortly afterwards. The county court judge thought that there was no evidence of an accident, but he was of opinion that there was evidence to support the following findings of facts : (1) that the deceased died from disease ; (2) that the disease was of long standing and progressive ; (3) that in consequence of the existence of disease the exertion involved in carrying the heavy parcel quickly to the train caused collapse and death.

HELD—that the death was attributable to the disease, and that the county court judge was right in finding that there was no evidence of “accident” within the meaning of the Workmen’s Compensation Act.

1871.—**Walker v. Hockney Brothers** (1909), 2 B. W. C. C. 20—C. A.

A workman gradually acquired paralysis of his right leg through the strain of riding a heavy carrier tricycle for his employers. At the end of five years the condition incapacitated him from work.

HELD—the paralysis was not due to “personal injury by accident.”

1872.—**Black v. New Zealand Shipping Co.** (1913), 6 B. W. C. C. 720 ; [1913] W. C. & I. Rep. 480—C. A.

An officer was superintending loading a ship for several days. The work was practically continuous day and night and very hard. Six days after the ship left port the officer died of heart failure. There was medical evidence that the death was due to heart failure caused by the continuous strain of work. The county court judge found there was no evidence of “accident.”

HELD—there was no misdirection.

1873.—**Walker v. Murrays**, [1911] Sc. 825 ; 48 Sc. L. R. 575, 741—Ct. of Sess.

A farm labourer, while engaged in his employment in driving a sow had a recurrence of an old rupture, which became strangulated and caused his death. There was no proof of anything specific having happened to him to cause the rupture to recur, and the arbitrator refused compensation on the ground that it was not proved that the workman met with an “accident.”

In an application for an order to state a case the court refused the application on the ground that, on the facts alleged by the applicant, it could not be held that the arbitrator had come to an unreasonable decision.

Notes.—This case is also inserted on another point (see [1914]).

1874.—**Clarkson v. Charente Steamship Co.**, [1913] W. C. & I. Rep. 422 ; 6 B. W. C. C. 540—C. A.

A fireman met with an accident to his knee while working on board his ship. About ten days later he was found to be suffering from a rupture in the groin which had ultimately to be operated on.

The medical evidence was that the rupture was an old one and must have been in existence before the date of the accident.

HELD—that there was evidence to support the county court judge's award in favour of the steamship company, and that the workman was not entitled to recover compensation.

1875.—Evans v. Dodd (1912), 5 B. W. C. C. 305—C. A.

A workman was employed to dip rings into a basin of carbon bisulphate with his fingers. He was affected with eczema, caused gradually by the exposure to fumes or splashes from the chemical. The county court judge found that this was not an "accident" within the section.

HELD—that there was evidence to support the finding.

1876.—White v. Sheepwash (1910), 3 B. W. C. C. 382—C. A.

The workman claimed compensation for incapacity due to blood poisoning following a sore foot. His particulars of claim stated, "wound on third toe of left foot, caused by rubbing of boot which had previously become permeated by some bone manure used by respondent on his land." At the hearing of the arbitration, the case he set up differed, and was that he had knocked his toe against a seed drilling machine, and the wound subsequently became poisoned by the manure which had saturated and dried in his boots some time before.

The judge found that the injury sustained by the applicant was caused by the pressure of a boot which had become too tight for him, and that this was not an "accident," neither did it arise "out of" his employment, and so made an award in favour of the respondent.

HELD—the award of the county judge was correct.

1877.—Steel v. Cammell, Laird & Co., [1905] 2 K. B. 232; 74 L. J. K. B. 610; 93 L. T. 357; 53 W. R. 612; 21 T. L. R. 490—C. A.

The applicant, a caulker in the employment of shipbuilders, was seized with paralysis caused by lead poisoning, and became totally incapacitated for work. In the course of his work, in which he had been employed by the shipbuilders for a period of two years before he became incapacitated, he had to smear either with red or white lead certain places between the plates of ships into which watertight shoes were put. The poisoning was such as might be expected from the nature of the work. It might be caused either by inhalation, or by eating food without having removed the lead from the hands, or by absorption through the skin. Only a small portion of cases of poisoning of this description occurred amongst a number of persons working with red or white lead. The poisoning could not be traced to any particular day, and its development was a gradual process, and generally took a considerable time.

HELD—that the lead poisoning could not be described as an "accident" in the popular and ordinary use of that word so as to entitle the applicant to compensation for "personal injury by accident

arising out of and in the course of his employment" within the meaning of s. 1 of the Workmen's Compensation Act, 1897.

Notes.—Lead poisoning is now an industrial disease under s. 8 and Schedule III. of the Act of 1906. *Fenton v. Thorley*, [1903] A. C. 443 [1839]; *Brintons v. Turvey*, [1904] 1 K. B. 328 [1849], and *Hamilton, Fraser & Co. v. Pandorf & Co.* (1887), 12 App. Cas. 518, considered.

1878.—*Marshall v. East Holywell Coal Co. ; Gorley v. Backworth Colliery (Owners)* (1905), 93 L. T. 360 ; 21 T. L. R. 494—C. A.

One coal miner was incapacitated for work by "beat hand" and another by "beat knee." "Beat hand" is an injury caused by an abscess gradually produced by the jar, friction, or pressure to the hand caused by using the pick ; and "beat knee" is an injury caused by an abscess in the knee gradually developed by long-continued kneeling whilst at work. Both are common injuries in the ordinary course of work in a coal mine.

HELD—that the injuries were not caused by "accident" within the meaning of s. 1, sub-s. 1, of the Workmen's Compensation Act, 1897.

Notes.—Collins, M.R., applying the decisions in *Fenton v. Thorley*, [1903] A. C. 443 [1839], and *Steel v. Cammell, Laird & Co.*, [1877], held that there was no accident in this case, since to be so "it must be something which is capable of being described as having occurred on a particular date, and it must be an accident in the ordinary and popular meaning of the word." "Beat hand" and "beat knee" are now made industrial diseases (see Order of May 22nd, 1907, sub tit. "Industrial Diseases," at p. 1075).

(3) *Disease Accelerated by Accident.*

1879.—*Clover, Clayton & Co. v. Hughes*, [1910] A. C. 242 ; 79 L. J. K. B. 470 ; 102 L. T. 340 ; 54 S. J. 375 ; 26 T. L. R. 359—H. L. (E.).

The respondent's husband, who was suffering from an aneurism in an advanced stage, and whose condition was such that he might have died at any moment, even in sleep, died in the course of his work after an operation which demanded no unusual exertion.

HELD (Lord Atkinson and Lord Shaw *diss.*)—that the man died from an "accident" within the meaning of the Workmen's Compensation Act, 1906, and that his widow was entitled to compensation.

Per Lord Loreburn, L.C. (at p. 244) : "What, then, is an 'accident' ? It has been defined in this House as 'an unlooked for mishap or an untoward event, which is not expected or designed.' All the Lords who took part in the decision of *Fenton v. Thorley* ([1903] A. C. 443) agreed in substance with this definition in Lord Macnaghten's speech. I take that as conclusive.

"Next, the accident must be one 'arising out of' the employment. There must be some relation of cause and effect between

the employment and the accident, as well as between the accident and the injury.

"My Lords, I think some of our difficulties in applying the Act are due to this. Courts of law have frequently been obliged to consider, especially in actions on policies of insurance, what is to be regarded as the cause of some particular event. In one sense every event is preceded by many causes. There is the '*causa proxima*,' the '*causa causans*,' the '*causa sine qua non*.' I will not pursue scholastic theories of causation. The '*causa proxima*' is alone considered in actions on a policy, as a general rule. I do not think that is the proper rule for cases under the section now under discussion, for the reasons explained by Lord Lindley in *Fenton v. Thorley*. It seems to me enough if it appears that the employment is one of the contributory causes without which the accident which actually happened would not have happened, and if the accident is one of the contributory causes without which the injury which actually followed would not have followed. And if this be so, it affords a guidance through the formidable arguments propounded by Mr. Simon on behalf of the appellants.

"This man died from the rupture of an aneurism, and 'the death was caused by a strain arising out of the ordinary work of the deceased operating upon a condition of body which was such as to render the strain fatal.' Again, 'the aneurism was in such an advanced condition that it might have burst while the man was asleep, and very slight exertion, or strain, would have been sufficient to bring about a rupture.' These are the findings and they bind us.

"The first question here is whether or not the learned judge was entitled to regard the rupture as an 'accident' within the meaning of this Act. In my opinion he was so entitled. Certainly it was an 'untoward event.' It was not designed. It was unexpected in what seems to me the relevant sense, namely, that a sensible man who knew the nature of the work would not have expected it. I cannot agree with the argument presented to your Lordships that you are to ask whether a doctor acquainted with the man's condition would have expected it. Were that the right view, then it would not be an accident if a man very liable to fainting fits fell in a faint from a ladder and hurt himself. No doubt the ordinary accident is associated with something external, the bursting of a boiler, or an explosion in a mine, for example. But it may be merely from the man's own miscalculation, such as tripping and falling. Or it may be due both to internal and external conditions, as if a seaman were to faint in the rigging and tumble into the sea. I think it may also be something going wrong within the human frame itself, such as the straining of a muscle or the breaking of a blood vessel. If that had occurred when he was lifting a weight it would be properly described as an accident. So, I think, rupturing an aneurism when tightening a nut with a spanner may be regarded as an accident. It cannot be disputed that a fatal injury was in this case due to this accident, the rupture of the aneurism under the strain. That, of itself, does not dispose of the case. It establishes that there may have been an injury by accident caused to the workman. But it does not establish that the accident was one 'arising out of the employment.' It is in these words that the stress of the case mainly lies, as Mr. Simon

in one passage of his argument partially indicated. When the man's condition was such that he might have died in his sleep, and the mere tightening the nut with no more strain than ordinary in such work caused the accident, can it be said that the accident was one 'arising out of' the employment? That seems to me to be the crucial point.

"I do not think we should attach any importance to the fact that there was no strain or exertion out of the ordinary. It is found by the county court judge that the strain in fact caused the rupture, meaning, no doubt, that if it had not been for the strain the rupture would not have occurred when it did. If the degree of exertion beyond what is usual had to be considered in these cases, there must be some standard of exertion, varying in every trade. Nor do I think we should attach any importance to the fact that this man's health was as described. If the state of his health had to be considered, there must be some standard of health, varying, I suppose, with men of different ages. An accident arises out of the employment when the required exertion producing the accident is too great for the man undertaking the work, whatever the degree of exertion or the condition of health.

"It may be said, and was said, that if the Act admits of a claim in the present case, every one whose disease kills him while he is at work will be entitled to compensation. I do not think so, and for this reason. It may be that the work has not, as a matter of substance, contributed to the accident, though in fact the accident happened while he was working. In each case the arbitrator ought to consider whether in substance, as far as he can judge on such a matter, the accident came from the disease alone, so that whatever the man had been doing it would probably have come all the same, or whether the employment contributed to it. In other words, did he die from the disease alone or from the disease and employment taken together, looking at it broadly? Looking at it broadly, I say, and free from over-nice conjectures, was it the disease that did it, or did the work he was doing help in any material degree?

"In the present case I might have come to a different conclusion on the facts had I been arbitrator, but I am bound by the finding, if there was evidence to support it. It is found that the strain contributed to the death. There was evidence on which the learned judge was entitled so to find, as I respectfully think, and I therefore advise your Lordships to affirm the order of the Court of Appeal."

Notes.—The above case is of great importance, as the meaning of the word "accident" and of the words "out of the employment" was fully discussed in the judgments in the House of Lords. It must be remembered that the decision of the majority of the House of Lords, and it was a very narrow majority, "was expressly put upon the view that there was evidence upon which the learned county court judge, upon a conflict of evidence, was entitled to hold as he did in favour of the workman" (*per* the Lord President in *Spence v. William Baird & Co. Ltd.*, [1912] S. C. 343 [1869]; see the notes to that case). Lord Atkinson in his dissentient judgment, [1910] A. C., at pp. 254–255, said: "In order that the 'mishap' should be 'unlooked for' or the event should 'be unexpected,' so as to make

an injury 'an injury by accident' within the meaning of the Act, the mishap must, I think, be 'unlooked for' or the 'event' be 'unexpected' by some person with knowledge of the facts and capable of judging reasonably of them.

"The death of the deceased was, it appears to me, no more an accident than if, had he been a butler, he had died walking slowly up the stairs of the house in which he served, or had he been a coachman, he had died while slowly mounting to his box. . . . While the word 'accident' remains in the statute, force and meaning must be given to it in construing the statute, and much as one must sympathise with the claimant, I for my part am unable to see that anything which was not normal and most probable, if not certain, befel the deceased." Lord Shaw of Dunfermline in his dissentient judgment, at p. 261, followed the decision in *Coe v. Fife Coal Co.*, [1909] S. C. 393 [1857], and in dealing with the argument that the event was accident if "unexpected," "unlooked for," "unintended," etc., adopted the language of Lord Kinnear in that case: "It seems to me that all these interpretations of the word point to some particular event or occurrence which may happen at an ascertainable time, and which is to be distinguished from the necessary and ordinary effect upon a man's constitution of the work in which he is engaged day by day. So defined, the word 'accident' seems to me to exclude the anticipated and necessary consequence of continuous labour." *Fenton v. Thorley*, [1903] A. C. 443 [1839]; *Ismay, Imrie & Co. v. Williamson*, [1908] A. C. 437 [1852]; *Brintons v. Turvey*, [1905] A. C. 230 [1849], discussed; *Pugh v. London, Brighton and South Coast Railway Co.*, [1896] 2 Q. B. 248; *Stewart v. Wilsons and Clyde Coal Co.*, 5 F. 120 [1840], cited; *Hensey v. White* [1841], referred to as being overruled by *Fenton v. Thorley*. See also *Golder v. Caledonian Railway*, [2563] and [2564], [2565].

1880.—M'Innes v. Dunsmuir & Jackson, [1908] S. C. 1021; 45 Sc. L. R. 804—Ct. of Sess.

A workman, while engaged, in the course of his employment, in moving a weight, had an attack of cerebral hæmorrhage as the result of the exertion he was using. The work was being performed in the usual manner. The workman was put to bed, and four days later a second attack supervened, which caused permanent paralysis. At the time of the first attack his arteries were in a degenerate condition, which rendered such an attack more likely to recur.

HELD—that the workman's final disablement had been caused by accident arising out of and in the course of his employment.

Notes.—*Stewart v. Wilsons and Clyde Coal Co.*, 5 F. 120 [1840]; *Fenton v. Thorley*, [1903] A. C. 443 [1839], followed; *Brintons v. Turvey*, [1905] A. C. 230 [1849], referred to.

1881.—Trodden v. T. M. Lennard and Sons, Ltd. (1911), 4 B. W. C. C. 190—C. A.

A workman was descending the side of a ship by a rope ladder. The ladder twisted suddenly, he gave a cry and fell into the water. He was dead when picked up. The medical evidence was that

death was due to heart failure, and not to drowning, and that the heart was in such a state that any slight exertion might have caused failure. The county court judge found that death was due to "accident arising out of and in the course of employment," and awarded compensation.

HELD—that there was evidence to support the finding.

Notes.—*Clover, Clayton & Co. v. Hughes* [1879] followed. *Barnabas v. Bersham Colliery*, 103 L. T. 513 [1893], distinguished.

1882.—*Johnson v. S.S. Torrington (Owners)* (1909), 3 B. W. C. C. 68—C. A.

A fireman on board ship was seen frequently drinking water while in the stokehole. Soon afterwards he was found to be very ill; he next became unconscious and died. No *post mortem* was held, and the medical evidence as to the cause of death was conflicting. The judge came to the conclusion, there being medical evidence to the effect, that the cause of the death was cerebral hæmorrhage, caused by the heat and drinking of excessive quantities of water.

HELD—that the question as to whether or not the workman did in fact sustain a "personal injury by accident arising out of and in course of the employment" was one of fact for the judge, and that there had not been any misdirection.

1883.—*Doughton v. Alfred Hickman, Ltd.*, [1913] W. C. & I. Rep. 143; 6 B. W. C. C. 77—C. A.

A workman was employed in loading heavy bags on to trucks and then pushing the loaded trucks on to a railway. The work was heavy, and three men were employed on it so that one man might rest while the other two worked except when they were pushing a truck, when all three worked. The workman had been working all the morning, and in the afternoon he had just joined with the other two men in pushing a truck, when he fell, and died soon afterwards. The medical evidence was that the man was suffering from fatty degeneration of the heart, but that the disease was not so far advanced that he would have died without being subjected to some strain.

HELD—that there was evidence to support the finding of the county court judge that the man died from a strain arising "out of and in the course of" his employment within s. 1 of the Workmen's Compensation Act, 1906.

Notes.—*Barnabas v. Bersham Colliery Co.*, 103 L. T. 513 [1893], distinguished. *Clover, Clayton & Co. v. Hughes* [1879] applied.

1884.—*Scales v. West Norfolk Farmers' Manure and Chemical Co.*, [1913] W. C. & I. Rep. 165; 6 B. W. C. C. 188—C. A.

A stoker suffering from rupture, and wearing a truss, suffered a strangulation of the hernia, while engaged in performing his duties of stoking, duties which involved great abdominal strain. He subsequently died from the effects of the strangulation.

HELD—that death was due to an “accident arising out of and in the course of the employment.”

Notes.—*Per Cozens-Hardy, M.R.* : “It may well be that an Act which admittedly involves considerable strain may be done many times without producing bad results, and yet the next time may end in an accident, and because the man had used in safety the heavy raking iron many times, that did not lessen the risk of strain which he ran from the hernia, and was incidental to his employment.” Compare *Walker v. Murrays* [1873]. See also *Woods v. Wilson*, [1907].

1885.—*Broforst v. S.S. Blomfield (Owners)* (1913), 6 B. W. C. C. 613 ; [1913] W. C. & I. Rep. 594—C. A.

A fireman, having been working for some time at shovelling coal and raking fires in the stokehold of a steamship, had an apoplectic stroke. The medical evidence went to prove that the man was in a diseased condition, and that such a stroke would be likely to be brought on by such exertion. The county court judge drew the inference that the injury was caused by “accident” within the meaning of the Act.

HELD—that there was evidence to support the inference.

Notes.—*Clover, Clayton & Co. v. Hughes* [1879] referred to.

III. *Former Accident Contributing to New Incapacity.*

N.B.—See also *Borland v. Watson, Gow & Co.* [1900] ; *Lloyd v. Sugg & Co.* [1842] ; *Martin v. Barnett* [2598], and *Wilkinson v. Frodingham Iron and Steel Co.* [2599].

1886.—*Noden v. Galloways, Ltd.*, [1912] 1 K. B. 46 ; 81 L. J. K. B. 28 ; 105 L. T. 567 ; 28 T. L. R. 5 ; 55 S. J. 838 ; 5 B. W. C. C. 7 ; [1912] W. C. Rep. 63—C. A.

In 1902 a workman met with an accident at certain works, where he was employed as a riveter, in consequence of which the first finger of his right hand was amputated at the root of the finger. He was paid compensation until the stump healed, but he could not resume his former work. In 1903 he was given work with the same employers as a caulker, which involved using a light hammer in place of the heavy hammer used by riveters. In 1910, at the suggestion of a foreman, he commenced using a heavy pneumatic hammer, during the use of which there was a great deal of vibration. A few days afterwards his hand became inflamed, and he was obliged to leave off work. He then claimed compensation under the Workmen's Compensation Act, 1897, in respect of the accident of 1902. The county court judge awarded compensation on the ground that the accident of 1902 was one of the contributing causes of the later incapacity.

HELD—that the question was not whether the accident of 1902 was a contributing cause to the later incapacity ; that taking all the circumstances together the later injury was met with under circumstances which did not involve an accident ; and further, that there

was no evidence to justify the county court judge finding as a fact that the accident of 1902 was one of the contributing causes of the later incapacity.

Notes.—Observations of Lord Loreburn, L.C., in *Clover, Clayton v. Hughes*, [1910] A. C. 242 [1879], distinguished on the ground that in that case the Lord Chancellor “was only dealing with the question, accident or no accident—he was not in the least considering the question whether it was enough to say that subsequent incapacity is necessarily to be regarded as due to an antecedent accident, or whether it may not be due to some other cause.”

1887.—*Brown v. Kemp* (1913), 6 B. W. C. C. 725; [1913] W. C. & I. Rep. 595—C. A.

A brewer's assistant was lifting a heavy cask standing on a shelf five feet from the ground, when he felt a severe internal pain and became faint and sick. He afterwards found that he had ruptured himself. Twenty-two years before he had had a rupture in the same place, for which he wore a truss for many years, but during the last four or five years he had left it off, as he found he could do his work without it. The county court judge held, that although there was “injury by accident” it did not arise “out of the employment,” as it was the result of a gradual weakening, and not of any unusual strain.

HELD—there was misdirection, “accident” having been found the evidence proved that it arose “out of the employment.”

Notes.—*Per Cozens-Hardy, M.R.*: “It is not in the least analogous to the case of an industrial disease like lead poisoning, where you cannot say the moment that it comes on, and as to which, but for the provision in the Act with reference to industrial diseases, there would be no accident at all. There is a finding here, and there could not help being a finding here, that there was an accident when the man was handling this cask, and an accident of such a kind as to cause a rupture, it was substantially in the place of the old rupture but the county court judge calls it a fresh rupture. I think that is a perfectly accurate term.”

IV. *Accident Occasioned by Assault or Murder.*

N.B.—See the very recent decision of the House of Lords in *Kelly v. Board of Management Trim Joint District School* [2014] and cases on pp. 889—892.

1888.—*Nisbet v. Rayne and Burn*, [1910] 2 K. B. 689; 80 L. J. K. B. 84; 103 L. T. 178; 54 S. J. 719; 26 T. L. R. 632; 3 B. W. C. C. 507—C. A.

A cashier was employed by certain colliery owners, and it was part of his regular duty to take large sums of money weekly from his employers' office to their colliery by rail for the payment of the wages of the colliers. Whilst he was thus engaged he was robbed and murdered in the train. His widow applied for compensation.

HELD—that the murder was an “accident” within the meaning of s. 1, sub-s. 1, of the Workmen's Compensation Act, 1906, and that

it arose not only "in the course of," but also "out of," the employment, inasmuch as the duty of carrying the money about subjected the cashier to the special risk of being robbed and murdered, which was consequently incidental to his employment; and that therefore the widow was entitled to compensation.

Notes.—*Challis v. London and South-Western Railway*, [1905] 2 K. B. 154 [2013], and *Anderson v. Balfour* [1889] applied; *Collins v. Collins*, [1907] 2 Ir. R. 104 [2016]; *Falconer v. London and Glasgow Engineering and Shipbuilding Co.* (1901), 3 F. 564 [2076], cited.

"It is argued" said Farwell, L.J., in this case, "that there was no accident at all, because death resulted from the intentional act of the murderer, and intention excludes any idea of accident. But the intention of the murderer is immaterial so far as any intention on the part of the victim is concerned, his death was accidental. . . . The point is covered by the decision in *Challis v. London and South Western Railway*, [1905] 2 K. B. 154, at p. 156, where Lord Collins says, 'He,' that is the county court judge—'appears to me to have decided that, as the stone was wilfully dropped, it was an intentional act, and, therefore there could not be said to have been an accident. I think that the judge was wrong in so holding. I do not think that there was anything in the fact that the stone was wilfully dropped to prevent what happened from being an accident from the standpoint of the person who suffered through it,' and by the Irish case of *Anderson v. Balfour* [1889]."

1889.—*Anderson v. Balfour*, [1910] 2 Ir. R. 497—C. A.

A gamekeeper, while engaged in the discharge of his duties, was attacked and beaten by poachers, as a result of which he was injured.

HELD (Cherry, L.J., *diss.*)—that the gamekeeper had been injured by "accident" within the meaning of the Workmen's Compensation Act, 1906.

Notes.—In this case the difficulty as to whether the accident arose out of and in the course of the employment did not arise, the question being as to whether the injury resulted from an "accident." The Lord Chancellor considered that this case came within the principle of *Challis v. London and South Western Railway*, [1905] 2 K. B. 154 [2013], but Cherry, L.J., in a strong dissentient judgment, said: "I do not think that the case is governed by the decision in *Challis v. London and South Western Railway*, because in that case the particular injury suffered was not desired or foreseen by the person whose act was the remote cause of it, while here I have no doubt that an intention to injure the gamekeeper—possibly to kill him—was present in the minds of his assailants throughout the occurrence." *Fenton v. Thorley*, [1903] A. C. 443 [1839], considered; *Collins v. Collins*, [1907] 2 Ir. R. 104 [2016], distinguished on the ground "that it was found therein that the violence which led to the workman's death did not arise out of his employment"; *Ismay, Imrie & Co. v. Williamson*, [1908] A. C. 437 [1852]; *Stewart v. Wilsons and Clyde Coal Co.*, 5 F. 120 [1840], cited.

It will be seen from the note to *Murray v. Denholme*, [1890],

that the Scotch courts favour the view of Cherry, L.J., and in this respect differ from the English (see *Nisbet v. Rayne and Burn* [1888]) and Irish courts.

1890.—Murray v. Denholm & Co., [1911] S. C. 1087 ; 48 Sc. L. R. 896 ; 5 B. W. C. C. 496—Ct. of Sess.

The employees in a wood yard having gone out on strike, other workmen were brought in to take their places. The strikers made an attack on the works and assaulted and threw stones at the workmen there employed. One of the workmen so injured claimed compensation under the Workmen's Compensation Act, 1906.

HELD—that his injury was not injury “by accident” within the meaning of s. 1 of the Act.

Opinion (*per* the Lord Justice-Clerk and Lord Salvesen, Lord Dundas *dubitante*) that the accident, if it was an accident, did not arise “out of” the employment.

Notes.—*Nisbet v. Rayne and Burn*, [1888] ; *Anderson v. Balfour*, [1889], disapproved ; *Challis v. London and South Western Railway*, [1905] 2 K. B. 154 [2013], distinguished ; *Armitage v. Lancashire and Yorkshire Railway Co.*, [1902] 2 K. B. 178 [2015] ; *Falconer v. London and Glasgow Engineering Co.*, 3 F. 564 [2076], applied ; *Fenton v. Thorley*, [1903] A. C. 443 [1839] ; *Clover, Clayton v. Hughes*, [1910] A. C. 242 [1879] ; *M'Intyre v. Rodger & Co.*, 6 F. 176 [2082], discussed ; *Brintons v. Turvey*, [1905] A. C. 230 [1849] ; *Ismay, Imrie & Co. v. Williamson*, [1908] A. C. 437 [1852] ; *Fitzgerald v. Clarke*, [1908] 2 K. B. 796 [1929], cited. See also *Poulton v. Kelsall* [2138].

This case is directly contrary to the decisions of the English and Irish courts, it being held in *Nisbet v. Rayne and Burn* [1888] that the question whether an accident is unexpected or designed must be regarded from the victim's point of view, and thus that where a man's death occurs through his being intentionally shot this is an “accident” within the meaning of the Act. The same view was taken by the Court of Appeal in Ireland, it being held (Cherry, L.J. *diss.*) that a gamekeeper who had been injured by poachers had suffered injury by “accident” (*Anderson v. Balfour* [1889]).

In the present case the above two cases were fully considered by the Court of Session in Scotland, who were of opinion that they were contrary to Lord Macnaghten's definition in *Fenton v. Thorley*, [1903] A. C. 443 [1839]. The Lord Justice-Clerk, in applying Lord Macnaghten's definition, said, [1911] S. C. (at p. 1091): “He therefore clearly excludes from his exegesis of ‘accident’ something which is designed. Now, can it be said, when a man stabs another or shoots another, that it is a mishap or untoward event ‘not designed.’ Lord Macnaghten's definition plainly means that an injury inflicted by design is not an accident. That which is designed is the antithesis of what is accidental.”

1891.—Blake v. Head (1912), 106 L. T. 822 ; 28 T. L. R. 321 ; 5 B. W. C. C. 303 ; [1912] W. C. Rep. 198—C. A.

The appellant, an errand boy in the service of the respondent, was, while at work, attacked by the respondent with a chopper, and so

severely injured as to be totally incapacitated. The respondent had been in an asylum, and was subject to periodical fits of melancholia.

HELD—that a felonious act done by an employer is not an “accident” arising out of the employment within the meaning of s. 1 of the Workmen's Compensation Act, 1906.

Notes.—Cozens-Hardy, M.R., who was one of the court in *Nisbet v. Rayne* [1888] said: “I do not think this was an accident at all. I think it was an intentional felonious act.” See also *Mitchinson v. Day* [2018].

1892.—*Low v. Port of London Authority* (1913), 6 B. W. C. C. 500; [1913] W. C. & I. Rep. 324—C. A.

This was a case of an assault on one of the workmen of the Port Authority. The case, having regard to the authorities, could not be argued in the Court of Appeal; the appeal therefore was formally dismissed with costs, with a view to an appeal to the House of Lords.

V. *Burden of Proof.*

N.B.—See also sub tit. “Out of and in the Course of”—“Burden of Proof.”

(1) *Onus on Applicant.*

1893.—*Barnabas v. Bersham Colliery* (1910), 103 L. T. 513; 55 S. J. 63; 4 B. W. C. C. 119, H. L.

The medical evidence was to the effect that a collier's arteries were in such a very diseased condition that apoplexy might have come upon him at any time, and there was no evidence that the seizure came upon him when he was incurring a strain.

HELD—that there was no evidence to support the award of the county court judge who had found that the man's death was not the result of a blow or fall, but was caused from apoplexy brought on by a strain while engaged in the heavy work of building the “pack,” the evidence of the cause of death being equally consistent with an accident and with no accident.

Per Lord Loreburn, L.C.: In cases under the Workmen's Compensation Act, as in other cases, the *onus* of proof of claim rests upon the applicant.

Notes.—The Lord Chancellor in this case said: “In cases under this Act, in the same way as in cases under any other Act or at common law, the plaintiff must prove his case; and although he may establish a state of facts which leads one to think that his version is quite a possible version of what took place, he must do something more than show a state of facts which is consistent either with one view or with another view.” *Marshall v. S.S. Wild Rose*, [1910] A. C. 486 [1901], referred to.

1894.—Hawkins v. Powell's Tillery Steam Coal Co., Ltd., [1911]
1 K. B. 988 ; 80 L. J. K. B. 769 ; 104 L. T. 365 ; 27 T. L. R.
282 ; 55 S. J. 329 ; 4 B. W. C. C. 178—C. A.

The burden of proof that an accident arose out of and in the course of employment lies on the workman or his representatives, and can only be discharged by direct evidence or necessary inference from the facts. Where, therefore, a workman while engaged on his work was taken ill and died of *angina pectoris*, which, according to the medical evidence, was of long standing, and might have produced death from several causes and not immediately following on any exertion, it was held that there was not sufficient evidence that the accident arose out of the employment.

Notes.—The question in this case really was as to whether the applicant had satisfied the test laid down in *Barnabas v. Bersham Colliery* [1893]. The court were of opinion that the applicant had not proved “by direct evidence or by legitimate inference from the facts proved” that the *angina pectoris* was due to what took place in the colliery and not elsewhere. *Clover, Clayton & Co. v. Hughes*, [1910] A. C. 242 [1879], distinguished.

1895.—Browne v. Kidman (1911), 4 B. W. C. C. 199—C. A.

A workman fell from a cart and was injured. He died nine days afterwards. The only medical evidence was to the effect that there was no connection between the accident and the death. The county court judge, however, found that death was due to the accident, and awarded compensation.

HELD—that the dependant had not discharged the *onus* of proving that death was due to the accident.

1896.—Marshall v. Sheppard, [1913] W. C. & I. Rep. 477 ; 6 B. W. C. C. 571—C. A.

A workman had to go in the course of his employment from a powder magazine to his employer's office two hundreds yards away down a steep path. At the magazine his clothes were clean and he was apparently in good health, but he arrived at the office covered with mud and in great pain. He was seen that afternoon by a doctor, who found him to be suffering from shock and complaining of pain in the abdomen. At that time the doctor examined the seat of an old rupture and found nothing wrong with it. That night the workman was sick two or three times, and next day the doctor found him to be suffering from strangulated hernia and he died after having been operated on in hospital. Both the hospital doctor and the doctor who attended the man said the vomiting might have caused the hernia to protrude so as to cause strangulation. In an application by the widow for compensation :

HELD—that the county court judge was justified in holding that the applicant, the wife, had failed to discharge the burden of proof that the injury which resulted in the death of the workman was caused by an accident arising out of and in the course of the employment.

Notes.—In judgment Cozens-Hardy, M.R., said : “ It is a pity that no question could be asked of his wife, as to what the deceased said happened to him, but that is the state of the law.”

1897.—Farmer v. Stafford, Allen and Sons, Ltd. (1911), 4 B. W. C. C. 223—C. A.

A man at work called out that he had hurt his back. No one saw what had happened. He was taken home, complaining of pains in the back and stomach. He died a week after, of intestinal obstruction. There was no evidence of previous illnesses and pains in the stomach.

HELD—that the *onus* of proving an “accident” had not been discharged.

1898.—Powers v. Smith (1910), 3 B. W. C. C. 470.—C. A.

Whilst a workman was driving a cart the horse fell, the shaft broke, and apparently the man was thrown out. He went to a farm to borrow another cart ; being unsuccessful in this he walked away with the horse and was subsequently found dead on the road at the top of the hill. The medical evidence was that he died from syncope but that it was impossible to say for certain what had caused the syncope. The judge held that the dependant had not discharged the *onus* of proving that the death was caused by the accident.

HELD—the court could not interfere with the decision, as it was for the judge to draw the inference from the facts that were put before him.

1899.—Thackway v. Conelly and Sons (1909), 3 B. W. C. C. 37—C. A.

A bus driver was sitting on the box of his bus ; a thud was heard, and he was found to have fallen from it ; there was no evidence as to how it happened. Conflicting medical evidence as to the cause of death was given, but as to the state of the man's heart it was agreed it was abnormal, and the county court judge stated that on the evidence he believed the man had died from heart failure and not from the fall, and that the applicant, therefore, had not discharged the *onus* of proving that the cause of death was a personal injury by accident arising out of and in the course of the deceased's employment.

HELD—that the death had not been shown to have been caused by accident.

(2) *Onus on Employer.*

900.—Borland v. Watson, Gow & Co., Ltd., [1912] S. C. 15 ; 49 Sc. L. R. 10 ; 5 B. W. C. C. 514—Ct. of Sess.

In arbitration proceedings to recover compensation under the Workmen's Compensation Act, 1906, it was proved that the claimant, while in the course of his employment on December 4th, 1908, felt

a severe pain in his knee, on rising from a kneeling position ; that on examination one of the cartilages of the knee was found to be ruptured ; that incapacity resulted ; that three years previously, while in the employment of third parties, he had sustained a " wrench " to the knee which resulted in incapacity for some weeks ; that on several subsequent occasions he felt momentary pain in the knee on rising from it, but was not thereby prevented from continuing to work.

HELD—that the claimant had suffered "injury by accident" on December 4th, 1908, within the meaning of the Act.

Per Lord Dundas.—That the *onus* lay on the employers to show that no new injury was really sustained, but that anything suffered on December 4th, 1908, was due to the former accident.

Notes.—*Brintons v. Turvey*, [1905] A. C. 230 [1849], cited. See also *Cory Bros. & Co., Ltd. v. Hughes*, [1911] 2 K. B. 738 [2720] ; and *New Monckton Collieries v. Toone*, [1913] W. C. & I. Rep. 425 [2721].

(3) *Drawing Inferences.*

1901.—*Marshall v. S.S. Wild Rose (Owners)*, [1910] A. C. 486 ; 79 L. J. K. B. 912 ; 103 L. T. 114 ; 54 S. J. 678 ; 26 T. L. R. 608—H. L. (E.).

The unexplained drowning of a seaman who rose from his sleep and went on deck for the sake of fresh air, and whose body was found in the water immediately under his usual resting place, does not justify the inference of fact that he met with an accident arising out of his employment. (*The Lord Chancellor and Lord James of Hereford diss.*).

Notes.—*Wakelin v. London and South Western Railway*, 12 App. Cas. 41, 49, cited.

1902.—*Howe v. Fernhill Collieries, Ltd.* (1912), 107 L. T. 508 ; 5 B. W. C. C. 629 ; [1912] W. C. Rep. 408—C. A.

A collier died from acute blood poisoning caused, according to the medical evidence, by septic infection spreading from a superficial ulcer on the knee. There appeared to have been a superficial abrasion of the skin just below his knee cap. Abrasions occasioned by kneeling on the coal dust while working in a very narrow seam were stated to be a frequent cause of blood poisoning in colliers. But there was no other evidence as to how or when the abrasion was caused.

HELD—that there was no evidence of injury by accident.

Notes.—*Mitchell v. Glamorgan Coal Co.* (1907), 23 T. L. R. 588 [2084], explained ; *Jenkins v. Standard Colliery*, 105 L. T. R. 730 [2085], cited.

1903.—*Honor v. Painter* (1911), 4 B. W. C. C. 188—C. A.

A carman fell from his van and sustained injuries. He died three weeks later. No evidence was produced to show the connection

between the accident and death, the doctor who had attended the man being abroad.

HELD—that there was no evidence that the death was due to the accident.

1904.—Beaumont v. Underground Electric Railways Co. of London, Ltd. (1912), 5 B. W. C. C. 247 ; [1912] W. C. Rep. 123—C. A.

A workman suffering from heart disease had to leave work owing to failure of the heart. He brought proceedings, alleging that he had strained his heart turning a heavy valve. The judge disbelieved his evidence, and there was no other evidence of an accident. The judge, nevertheless, found that the man had strained his heart at work, and that he was injured by accident arising out of the employment.

HELD—that there was no evidence to support the finding.

Notes.—*Clover, Clayton v. Hughes*, [1910] A. C. 242 [1879], distinguished on the ground that in the present case there was “not a particle of evidence of arising out of the employment” (*per Cozens-Hardy, M.R.*). *Hawkins v. Powell's Tillery Steam Coal Co.*, [1894], referred to.

1905.—Perry v. Ocean Coal Co., Ltd., (1912) 106 L. T. 713 ; 5 B. W. C. C. 421 ; [1912] W. C. Rep. 212—C. A.

Although when acting as arbitrator in cases arising under the Workmen's Compensation Act, 1906, a county court judge may, and in many cases ought, to proceed without any direct evidence, and although he may, and in many cases ought, to proceed upon indirect evidence, which justifies his drawing an inference, yet there is nothing to justify him in doing that which is merely a balancing of probabilities.

A workman, who suffered from an old hernia, suddenly felt a severe pain whilst at work in a mine. The hernia had become strangulated and he died as a result. There was no evidence that anything which he was doing was likely to cause him a strain. The county court judge thought that in all probability the strangulation was due to the result of some act of exertion which he underwent when he was at work and made his award in favour of the widow.

HELD—that there was no evidence to support the inference.

1906.—Paton v. William Dixon, Ltd., [1913] S. C. 1120 ; 50 Sc. L. R. 866 ; [1913] W. C. & I. Rep. 517—Ct. of Sess.

A workman sustained an injury to his back on December 7th, 1911, which totally, and thereafter partially, incapacitated him for work. On May 1st, 1912, the medical referee certified that he would be fit for his usual work in three weeks, and he accordingly resumed his old work on May 27th, 1912. From that date he worked regularly until August 15th, 1912, when he again became totally incapacitated owing to aneurism of the heart. He was not troubled with pain in the cardiac region until July, 1912, nor did any of the medical men

(including the medical referee) who examined him at or before May 1st, 1912, suspect any cardiac trouble. The workman having claimed compensation under the Workmen's Compensation Act, 1906, in respect of the accident of December 7th, 1911, the arbitrator refused compensation.

HELD—that there was evidence on which the arbitrator might find as he did.

Notes.—*Coe v. Fife Coal Co.* [1909] S. C. 393 [1867]; *Fenton v. Thorley*, [1903] A. C. 443 [1839]; *Hawkins v. Powell's Tillery Steam Coal Co.* [1894], referred to.

1907.—*Woods v. Wilson, Sons & Co.* (1913), 29 T. L. R. 726; [1913] W. C. & I. Rep. 569; 6 B. W. C. C. 750—C. A.

A workman was engaged in a lighter in coaling a ship. He was in the act of filling a basket held between his body and a heap of coal when a rush of coal came which either hit him in the stomach or knocked the basket against his stomach, and he was unable to go on with his work. He sat down in great pain, and shortly afterwards went home. He was attended for four days by his own doctor and was then sent to the infirmary, where an operation was performed, and a perforation of the bowel was discovered. At the same time it was ascertained by the operating surgeons that he had been suffering from chronic appendicitis. Three days afterwards he died from peritonitis, and during a *post mortem* examination another perforation of the bowels was discovered. The county court judge found that the physical condition of the man at his age would be likely to produce and did produce a weakened bowel, and that the accident caused acute injury to the weakened bowel, which otherwise might have lasted for a considerable time and not interfered with his efficient work; and that the injury so caused gradually produced perforation and so accelerated his death. He accordingly made an award in favour of the workman's widow. On appeal:

HELD (Kennedy, L.J., *diss.*)—that though there was undoubted evidence of accident, there was no evidence to connect the death with the accident, and therefore that the award in favour of the workman's widow could not stand.

Notes.—*Barnabas v. Bersham Colliery Co.*, 103 L. T. 513 [1893], and *Clover, Clayton v. Hughes*, [1910] A. C. 242 [1879], referred to.

1908.—*Olson v. S.S. Dorset (Owners)* (1913), 6 B. W. C. C. 658; [1913] W. C. & I. Rep. 604—C. A.

A ship's stoker, while on duty on a ship in the tropics, went into a coal bunker adjoining the stokehold, and was soon afterwards found in a condition of heat apoplexy. Upon the medical evidence the arbitrator found that it might have been caused by the heat of sun or of the stokehold, and that it was not proved that the fit had been brought on by the work the man had been doing at the time and that therefore the apoplexy was not caused by accident arising out of the employment.

HELD—there was no misdirection.

1909.—Bellamy v. J. Humphries and Sons, Ltd. (1913), 6 B. W. C. C. 53; [1913] W. C. & I. Rep. 169—C. A.

A weaver got dust in his eye; he rubbed the eye and an abrasion appeared, into which a microbe, having no special relation to his employment, subsequently entered and set up inflammation causing incapacity. There was no evidence as to when the microbe entered. The county court judge assumed the abrasion had been caused by rubbing on account of the dust, but as the microbe might have entered at any time, he found in favour of the employers.

HELD—that there was evidence to support the finding.

Notes.—*Dunham v. Clare*, [1902] 2 K. B. 292 [2560]; *Adams v. Thompson*, 5 B. W. C. C. 19 [1855], distinguished.

1910.—Kerr v. Ritchies (1913), 50 Sc. L. R. 434; 6 B. W. C. C. 419; [1913] W. C. & I. Rep. 297—Ct. of Sess.

A workman, apparently in good health, died suddenly from heart failure while at work lifting baskets filled with corn. The sheriff-substitute found “that nothing unusual or unexpected occurred in the course of his work that afternoon until the sudden attack of illness” and “that the strain arising from the exertion made by the deceased in repeatedly lifting the baskets was a contributing cause of the heart failure.” He found that death was due to accident.

HELD—there was no evidence to support the finding.

Notes.—*Clover, Clayton & Co. v. Hughes* [1879], distinguished. *Beaumont v. Underground Electric Railways Co. of London, Ltd.* [1904] applied.

1911.—Wood v. D. Davis and Sons, Ltd. (1911), 5 B. W. C. C. 113—C. A.

A collier was washing on his return from work, when his wife saw a small scratch on his knee, and a large lump on his groin. He died in a few days from blood poisoning which started from the scratch. There was no evidence as to how he got the scratch, but there was medical evidence that the scratch could not have caused the lump, if the scratch had only been made on the day the lump appeared. The county court judge inferred that the scratch had been caused at work, and the accident accordingly arose in course of the employment, and awarded compensation.

HELD—there was no evidence to support the inference.

Notes.—*Mitchell v. Glamorgan Coal Co.*, 23 T. L. R. 588 [2084], distinguished.

1912.—Fitzgerald v. Murphy (1911), 45 Ir. L. T. 200—C. A. (Ir.).

A workman, on returning from work one evening showed his wife a scratch or mark behind one ear. He continued to work, but continually complained of pain, and after a fortnight went to hospital, where he died of acute blood poisoning. Statements made by the

deceased, in the absence of his employer, to his wife and the doctor as to the cause of the accident, were admitted in evidence although objected to. Evidence was given on behalf of the employer that the deceased had a pimple behind his ear and that if he scratched it and dirt got in, blood poisoning would be caused. The county court judge was not satisfied that there had been "personal injury by accident arising out of and in the course of the man's employment," and dismissed the application. On an appeal on the ground that illegal evidence had been admitted:

HELD—that there were facts in evidence to support the decision, and the appeal should be dismissed.

1913.—Griffiths v. North's Navigation Collieries (1889), Ltd. (1912), 5 B. W. C. C. 21—C. A.

A collier fell on his shoulder and gave up work, complaining of pain in his shoulder. The county court judge found on the medical evidence that the pain was not due to the fall.

HELD—there was no evidence of injury by accident.

1914.—Walker v. Murrays, [1911] S. C. 825; 48 Sc. L. R. 741; 4 B. W. C. C. 409—Ct. of Sess.

A farm labourer, while engaged in his employment, had a recurrence of an old rupture, which became strangulated and caused his death. There was no proof of anything specific having happened to him to cause the rupture to recur, and the arbitrator refused compensation on the ground that it was not proved that the workman had met with an "accident."

HELD—that on the facts the arbitrator's decision could not be held to be unreasonable.

Notes.—*Wakelin v. London and South Western Railway (1886)*, 12 App. Cas. 41, referred to. The Lord President in his judgment, [1911] S. C., at p. 831, said: "In this case the rupture might have come down because the deceased ran after the straying sow, but it might have come down through disease or through a mere fit of sneezing. We know nothing about it; and on the whole I do not find facts here which drive me to the inference that the death was caused by an accident arising out of or in the course of his employment." Compare *Scales v. West Norfolk Farmer's Chemical Co. [1884]*. This case is also inserted *ante* [1873].

1915.—Hugo v. H. W. Larkins & Co. (1910), 3 B. W. C. C. 228—C. A.

At an arbitration there was a dispute between the medical experts as to the mere possibility of a wound in the hand on April 17th causing erysipelas of the face on July 7th. There was no evidence that it had done so. The case was adjourned, and the medical referee sent for and sworn as a witness. He was asked the abstract question whether it was impossible for the organisms of erysipelas to be latent for so long a time, to which he replied that it was not impossible. The facts of the particular case were not put before him.

HELD—there was no evidence to justify the finding that the deceased man died from personal injury by accident.

A medical referee should not be sworn and examined as a witness.

VI. Evidence.

1916.—*Gilbey v. Great Western Railway Co.* (1910), 102 L. T. 201 ; 3 B. W. C. C. 135—C. A.

In a claim for compensation under the Workmen's Compensation Act, 1906, by the dependant of a deceased workman, statements alleged to have been made by the workman in the absence of his employer shortly before his death are not admissible as evidence of the occasion and cause of the injury from which the workman suffered.

Notes.—*Per* Cozens-Hardy, M.R. : “ I do not doubt at all that statements made by a workman to his wife of his sensations at the time, about the pain in the side or head, or what not—whether those statements were made by groans or by actions or were verbal statements—would be admissible to prove the existence of those sensations. But to hold that those statements ought to go further and be admitted as evidence of the facts deposed of is, I think, open to doubt ; such a contention is contrary to all authority.”

Per Fletcher Moulton, L.J. : “ In cases of this kind we do give considerable latitude in admitting the statements of deceased persons under the head of what is called *res gestæ*. But to admit these statements in evidence would be to go far beyond what the court has ever sanctioned and contrary to the English law.” *Aveson v. Lord Kinnaird* (1805), 6 East, 188, and *R. v. Foster* (1834), 6 C. & P. 325, distinguished.

1917.—*Smith v. Hardman and Holden, Ltd.*, [1913] W. C. & I. Rep. 459 ; 6 B. W. C. C. 719—C. A.

On an application by the dependants of a deceased man for compensation, the county court judge held that evidence of statements by the deceased as to the cause of his injury was not admissible, but allowed the evidence to be given in case he was wrong, saying that his judgment would be independent of that evidence.

HELD—that as the Court of Appeal had previously laid down in the most definite manner that such evidence was not admissible, the county court judge ought not to have allowed it to be given.

HELD, FURTHER—that the evidence had coloured the whole decision, and that there must therefore be a new trial before a different county court judge.

1918.—*Donaghy v. Ulster Spinning Co., Ltd.* (1911), 46 I. L. T. 33 ; [1912] W. C. Rep. 183—C. A. (Ir.).

A strong and healthy man, aged twenty-eight, employed as a tinsmith, went to his work on July 1st, apparently well. On his return he complained to his wife of pain in the head and pointed to the left side of his head, which she examined, but found no visible

marks of an injury. He made a statement to her as to an injury he had received and the cause of it. On July 17th cross-paralysis set in, and on July 20th he died of compression of the brain following on concussion. There was no direct evidence showing that an accident had occurred in the course of his employment, and there was no visible mark of any injury. In addition to the statement to his wife, he made a statement to the doctor who attended him as to the nature of the injury and its immediate cause. These statements, made in the absence of his employers, were ruled out as not admissible in evidence, and the recorder, in the absence of evidence showing that deceased died from the effects of an injury, dismissed a claim for compensation under the Workmen's Compensation Act, 1906.

HELD—that the Recorder was right in excluding the statements made by the deceased as to the cause of the alleged injury, and in dismissing the claim.

Notes.—In his judgment Cherry, L.J., said: "I must confess that in *Wright v. Kerrigan* [2088] my opinion was that there was no evidence whatever as to the cause of the injury, or as to its having been incurred in the course of the man's employment, unless the statements of the man himself were admitted in evidence. I was always under the impression that in such cases the best and, in many cases, the only evidence that can be obtained, as to the nature and effects of an injury, is the statement of the injured man himself, and that evidence as to the nature of the injury includes not only the physical fact of the injury, but also the immediate cause. It is an additional part of the statement as to the nature of the injury. However, the English decisions, that have been cited hold otherwise, and must be followed by us. It will have the effect of shutting out hundreds of cases where no other evidence of the nature of an injury is obtainable. We cannot be responsible for that." *Wright v. Kerrigan*, [1911] 2 Ir. R. 301 [2088], considered and distinguished. *Gilbey v. Great Western Railway Co.* [1916], followed.

1919.—*Hewitt v. Stanley Brothers, Ltd.* [1913] W. C. & I. Rep. 495; 6 B. W. C. C. 501—C. A.

A workman went to work at 9 a.m. At 10.30 a.m. he was found by the works foreman in a shed of the works complaining of an injury from an accident, and in a serious condition. He died from the effects of this injury. No written notice of the accident was given until thirteen days afterwards. The county court judge drew the inference that the workman died of an injury caused by an accident arising "out of and in the course of" his employment.

HELD—that there was evidence to support the finding.

Semble, the deceased's statements, though evidence of notice, were not admissible as proof of an accident. Notice to the works foreman was notice to the employers.

1920.—*Wolsey v. Pethick Brothers* (1908), 1 B. W. C. C. 411—C. A.

A statement made by a deceased workman to a fellow workman as to the cause of his injury is not admissible, as there is no duty to

make such a statement. Award set aside upon the ground that the arbitrator had received evidence of such a statement, and that no other evidence justifying the award existed.

Notes.—The court held that there was no such duty as to make the principle of *Price v. Lord Torrington* (1704), 2 Sm. L. C. (10th ed.), 310, applicable.

1921.—Langley v. Reeve (1910), 3 B. W. C. C. 175—C. A.

A workman died of pneumonia. His dependants contended the pneumonia resulted from lowered vitality caused by an accident to the workman arising out of and in course of his employment. The only evidence that there had been an accident consisted of several inconsistent statements made by the workman, to various persons, on the day after the alleged accident, which were admitted without any objection being taken.

The medical referee gave a report that the pneumonia could not have been caused by the alleged accident.

The county court judge said that he was not bound to surrender his judgment to the medical referee, and held that there had been an accident causing the pneumonia, and so he awarded compensation.

HELD—that there was no evidence that there had been any accident arising out of and in the course of his employment.

1922.—Tucker v. Oldbury Urban District Council, [1912] 2 K. B. 317 ; [1912] W. C. Rep. 238 ; 106 L. T. 669 ; 5 B. W. C. C. 296—C. A.

A workman died of blood poisoning starting in his thumb, and his dependants made a claim for compensation and adduced evidence to show that the blood poisoning was caused by the entry of a splinter of steel whilst the deceased had been at work. The employers tried to put in evidence a statement made by the deceased to their foreman and other workmen in which he attributed his poisoned thumb to a whitlow and denied having had any accident. The county court judge refused to admit the statement as evidence.

HELD—that the statement by the deceased was not evidence.

Notes.—Two points were raised on appeal, (1) whether the statement was admissible as an *admission*; (2) whether it was admissible as a declaration against interest. As to (1)—it was held that the statement was not admissible as an *admission* by the deceased inasmuch as the applicants had as dependants, a direct statutory right against the employers under Schedule I. (1) (a); the deceased was not a party to the litigation; and the applicants did not derive their title to compensation by derivation from him. As to (2)—it was held that the statement was not admissible as a declaration against interest, inasmuch as it must be shown that the statement was to the knowledge of the deceased contrary to his pecuniary (or proprietary) interests, and the statement in question did not satisfy that requirement, for when it was made no claim had been put forward nor was there any reason to believe that the workman knew that he ever would be able to make a claim. Moreover the

particular statement in question was not necessarily against the interests of the deceased, for it was not of such a nature as to be inimical to, or to militate against the success of, a claim on his part, if he had lived to make one.

Sussex Peerage Case (1844), 11 Cl. & Fin. 85, and the judgment of Blackburn, J., in *Smith v. Blakey* (1867), L. R. 2 Q. B. 326, 332, referred to as showing that the declarations of the deceased must be against his pecuniary or proprietary interests. *Massey v. Allen* (1879), 13 Ch. D. 558, referred to as showing that it is not sufficient that they should be such as it turns out were against his interests.

1923.—*Richards v. Sanders & Sons* (1912), 5 B. W. C. C. 352; [1912] W. C. Rep. 407—C. A.

A painter claimed compensation for a strained heart. The doctor was subpoenaed, but did not attend, and three certificates, though objected to, were admitted in evidence by the judge, who awarded for the workman.

HELD—the certificates were inadmissible, and as they must have influenced the mind of the judge, a new trial was necessary.

1924.—*Dundee Steam Trawling Co. v. Robb* (1910), 48 Sc. L. R. 11—Ct. of Sess.

Circumstances in which the court, on the failure of an arbitrator to state the salient points of the evidence on which his finding was based, used, of consent of parties, a transcript of the notes of evidence taken *ex parte* in the court below, and reversed his decision.

Per the Lord President: “I must add that the entry ‘contusion of chest’ in the register of deaths proves, in the absence of the doctor, nothing as to its own correctness.”

Notes.—*Marshall v. S.S. Wild Rose (Owners)* [1901]; *Moore v. Manchester Liners, Ltd.* [1965], referred to.

1925.—*Jessop v. Maclay* (1912), 5 B. W. C. C. 139—C. A.

A seaman claimed compensation. The ship on which the alleged accident happened had sailed for a foreign port before the employers obtained the evidence necessary for their case from witnesses on board. They sent abroad for depositions of these witnesses. The county court judge, after granting adjournments on terms, finally went on with the case without waiting for the depositions.

HELD—that the case must be re-heard before another judge.

1926.—*Peters v. S.S. Argol (Owners)* (1912), 5 B. W. C. C. 414; [1912] W. C. Rep. 172—C. A.

A seaman returning to his ship from shore fell from the gangway and was drowned. On the hearing of a claim by the dependants the deputy judge began to give his award in favour of the dependants, when it was pointed out to him that there had been no evidence that the seaman went on shore with leave. The deputy judge thereupon

had a witness recalled upon this point, and being satisfied from this that the seaman had been given leave, awarded for the dependants.

HELD—that the judge was entitled to hear the evidence in this way.

1927.—South Eastern and Chatham Railways Co.'s Managing Committee v. Ewell (1911), 5 B. W. C. C. 39—C. A.

Before the commencement of the hearing of an employers' application to review it was decided not to call a witness who, at the last moment, said he wished materially to alter his proof. He was in consequence sent away. Some hours later the workman's counsel called for this witness who, he said, had been subpoenaed. The employers were not aware of the existence of the subpoena, which had in fact been served; they at once enquired of the proper officials of the court, who informed them that the witness had not been subpoenaed; they concluded that a mistake had been made, and that the witness had not been subpoenaed. In consequence they did not send for the witness. Without proving the subpoena, or asking for an adjournment, the workman's counsel went on with the case without this witness's evidence and lost it. The workman appealed.

Ordered by consent, that the matter be re-heard.

See also *Amy's v. Barton* [2031]; *Fitzgerald v. Murphy* [1912]; and opinion of Cherry, L.J., in *Wright v. Kerrigan* [2088].

LIABILITY OF EMPLOYERS TO WORKMEN FOR INJURIES—*cont.*

C. "Arising Out of and in the Course of the Employment."

THE accident must arise both "out of" and "in the course of" the employment (*Smith v. Lancashire and Yorkshire Railway* [1928]). The words "out of" point to the origin or cause of the accident; the words "in the course of" point to the time, place and circumstance (*per* Buckley, L.J., in *Fitzgerald v. Clarke* [1929]). In the cases which follow an arbitrary system of classification has been adopted whereby the cases in the main have been divided under one or other of the two heads "out of" or "in the course of." The courts do not as a rule distinguish in judgments the two sets of cases (see *per* Lord Loreburn, in *Kitchenham v. S.S. Johannesburg (Owners)* [1930]); but it has a practical value in a text-book, since in point of fact the case only raises (as a rule) a doubt as to whether the accident was "out of" or whether the accident was "in the course of."

"Out of" the Employment.

As to cases where the accident was alleged or held to arise "out of" the employment.

Firstly, as to the burden of proof required. The burden of proving that the accident arose both out of and in the course of the employment is upon the applicant (*Pomfret v. Lancashire and Yorkshire Railway* [1932]; *O'Brien v. Star Line* [1933]; *Gilbert v. Steam Trawler Nizam (Owners)* [1934]; *Millers v. North British Locomotive Co.* [1935]; *Dyhouse v. Great Western Railway* [1936]; *Smith v. Stanton Ironworks Co. Collieries, Ltd.* [1937]; *Sherwood v. Johnson* [1938]; *Chandler v. Great Western Railway* [1949]; *Bender v. S.S. Zent* [1955]). But where the applicant is unable to prove his case by direct evidence, the arbitrator may draw the inference from the facts which have been proved that the accident arose out of the man's employment. No rules can be laid down to determine what inferences the arbitrator may draw, as each case must be decided by him *purely as a question of fact*, and his finding will not be upset unless it be such that no reasonable man would so decide upon the evidence (see note to *Sneddon v. Greenfield Coal and Brick Co.* [1948]; *Gatton v. Limerick S.S. Co.* [1954]). The case of *Evans v. Astley* [1939] and the cases following it give examples of inferences which may and may not be drawn legitimately.

The principle that the *onus* is upon the applicant to prove that the accident arose out of and in the course of the employment is well illustrated by cases in which seamen have been found drowned or disappeared at sea. It would appear from the decisions in *Owners of Swansea Vale v. Rice* [1951]; *Lee v. Stag Line, Ltd.* [1952];

Mackinnon v. Miller [1953], that if the deceased was on duty at the time of his disappearance the inference in favour of the applicant may be drawn, *secus* if he was not on duty at the time (*Bender v. S.S. Zent* [1955]; *Burwash v. Leyland & Co.* [1956]); but no rule can be laid down, for each case must be decided upon its own facts. If there is any evidence and the judge draws the inference in favour of the applicant, the Court of Appeal will not interfere (*Gatton v. Limerick Steamship Co.* [1954]), but there must be facts from which an inference can be drawn as distinguished from conjecture, surmise or probability (*Lendrum v. Ayr Steam Shipping Co.* [1957]). In this connection it is useful to compare the cases of seamen going ashore and returning to their ships. These cases are quite different in principle from the cases of workmen going to and returning from work, since in the case of seamen their duties extend throughout the whole twenty-four hours at irregular intervals, while workmen have fixed hours, and outside those hours whatever injury happens it does not happen to them *quâ* workmen. We submit that, in consequence of the continuity of the employment of seamen, all these accidents are "in the course of" the employment (unless the seaman is on shore without leave). This limits the question to: Does the accident arise "out of" the employment? (see generally as to this *Kitchenham v. S.S. Johannesburg (Owners)* [1930]; *Fletcher (or Hewitt) v. Owners of S.S. Duchess* [1958]; *Low (or Jackson) v. General Steam Fishing Co.* [1959]). If the accident happens while crossing a gangway it clearly arises "out of" (*Robertson v. Allan* [1963]; *Canavan v. S.S. Universal* [1964]). Similarly if the seaman was going ashore for necessities and fell into the water when returning (*Moore v. Manchester Liners* [1965]); *secus* if applicant on a trip ashore (*Hyndman v. Craig & Co.* [1961]; *Biggart v. S.S. Minnesota* [1962]). In all such cases the *onus* is upon the applicant (*McDonald v. S.S. Banana* [1966]; see also *Mitchell v. Owners of S.S. Saxon* [1967]; *Dixon v. Owners of S.S. Ambient* [1968]). If the accident is due (entirely?) to intoxication (*Frith v. Owners of S.S. Louisianian* [1969]), or to wilful disobedience to orders (*Griggs v. S.S. Gamecock* [1970]), or to adopting an unnecessarily dangerous method of getting back (*Halvorsen v. Salvesen* [1971]) the applicant cannot recover.

Secondly, as to the sphere of employment. In the case of seamen refer to *Fletcher (or Hewitt) v. Owners of S.S. Duchess* [1958]; *Low (or Jackson) v. General Steam Fishing Co.* [1959]. For the workman to come within the protection of the Act it is necessary that the accident should have happened to him whilst doing something which he would naturally be expected to do from the nature of the work upon which he is employed. If a man is employed to do anything and he does it recklessly or negligently, and an accident occurs, he may yet be entitled to compensation; but if he does something quite unconnected with what he is employed to do, he will not be able to recover anything for the injury which he suffers; for only in the former case will the accident be held to arise out of the employment. Even if the servant violates the order of his master the latter is liable if the servant was acting within the scope of his employment (*Whitehead v. Reader* [1972]; *Conway v. Pumpherson Oil Co.* [1973]). *Harding v. Brynddu Colliery Co.* [1974] extends this to cases of wilful misconduct (*secus* if *serious* and wilful, etc.). See also *Watkins v.*

Guest, Keen and Nettlefolds [1975]; *Maudsley v. West Leigh Colliery Co.* [1976]. The adoption of a wrong and dangerous method of doing work will not necessarily deprive the workman of compensation (*Durham v. Brown* [1977]; *Gallant v. S.S. Gabir* [1978]). If a workman is injured whilst doing an act, which is not so remote from his ordinary duties that it cannot fairly be said to be outside the scope of his employment, he will be entitled to recover compensation (*Greer v. Lindsay Thompson* [1980]; *Goslan v. Gillies* [1981]; *Henneberry v. Doyle* [1982]; *Harrison v. Whitaker* [1983]; *Tobin v. Hearn* [1984]; *Weighill v. South Hetton Coal Co.* [2001]).

On the other hand, if a workman voluntarily undertakes work which is quite outside the scope of the particular kind of work which he is employed to do, and suffers injury by accident, he will not be entitled to recover, even although he has undertaken such work in furtherance of his employer's interests. Thus the accident will not be held to arise "out of" the employment where an unskilled labourer interferes with machinery which he has been expressly forbidden to touch (*Love v. Pearson* [1985]; *Losh v. Evans* [1986]; *M'Allan v. Perthshire County Council* [1987]; *Whelan v. Moore* [1988]; *Jenkinson v. Harrison, Ainslie & Co.* [1989]; *Marriott v. Brett, Beney, Ltd.* [1990]; *Naylor v. Musgrave Spinning Co.* [1991]; *Davies v. Crown Perfumery Co.* [1992]; *McDiarmid v. Ogilvy Brothers* [1993]; *McCabe v. Henry North and Sons* [1994]), or where the workman arrogates to himself the functions of some other servant whose duties are different from his own (*Kerr v. William Baird & Co.* [2002]; *Burns v. Summerlee Iron Co.* [2003]; *Smith v. Fife Coal Co.* [2004]), or where he travels into some territory with which he has nothing to do, and where he has no right to be (*Smith v. South Normanton Colliery Co.* [1998]; *Tomlinson v. Garratts, Ltd.* [1999]; *Parker v. Hambrook* [2000]).

Even where the sphere of labour is expressly defined by the employer, it may be so enlarged by the orders of superior fellow-workmen that an accident resulting from an act done in accordance with those orders, although in contravention of the regulations of the employer, may entitle the workman to compensation (*Geary v. Ginzler* [2007]; *Brown v. Scott* [2008]). But though the act is ordinarily outside the scope of the employment, if it is done in an emergency the resulting accident may be held to arise out of and in the course of the employment (*Rees v. Thomas* [2009]; *Devine v. Caledonian Railway* [2010]; *London and Edinburgh Shipping Co. v. Brown* [2011]; *Menzies v. M'Quibban* [2012]).

Thirdly, as to risks incidental and not incidental to the employment. In order that the danger to which the man is exposed should be one incidental to his employment it is necessary that there should be "under the particular circumstances of a particular vocation something appreciably and substantially beyond the ordinary normal risk which ordinary people run, and which is a necessary concomitant of the occupation the man is engaged in" (*per Lord Collins*, in *Andrew v. Failsworth Industrial Society* [2021]). Thus workmen engaged in certain kinds of work are liable to be injured, owing to the nature of their work, by the tortious acts of other persons, e.g., engine drivers (*Challis v. London and South Western Railway* [2013]; see also *Kelly v. Board of Management Trim Joint*

District School [2014]); but if the injury is not caused owing to the special nature of their employment the Act will afford no protection (*Armitage v. Lancashire and Yorkshire Railway* [2015]; *Collins v. Collins* [2016]; *Murphy v. Berwick* [2017]; *Mitchinson v. Day* [2018]; *Shaw v. Wigan Coal and Iron Co.* [2019]; see also *Manson v. Forth and Clyde Steamship Co.* [2020]). So also if the place in which the man is working, or the nature of the work, involve a special risk of injury by sunstroke, frost, lightning, or other damage by the weather, the injury will be held to arise out of the employment (*Andrew v. Failsworth Industrial Society* [2021]; *Davies v. Gillespie* [2026]; *Anderson v. Adamson* [2022]). But the injury is not incidental to the employment where it is not due to any of the particular circumstances of the employment, but is such that it might be suffered by any persons in the locality whether so employed or not (*Warner v. Couchman* [2024]; *Karemaker v. S.S. Corsican (Owners)* [2025]; *Blakey v. Robson, Eckford & Co.* [2028]); *Kinghorn v. Guthrie* [2029]). The same test applies in cases in which injury is inflicted by animals, as is shown in the cases of *Craske v. Wigan* [2030]; *Amys v. Barton* [2031]; and *Hapelman v. Poole* [2032]. Another class of case in which this question frequently arises is where persons have been injured by accidents in the streets. Thus in *Pierce v. Provident Clothing and Supply Co.* [2033]; *M'Neice v. Singer Sewing Machine Co.* [2034]; and *Miller v. Refuge Assurance Co.* [2037], it was held that persons who had been injured in the streets during the course of their employment had suffered injury by accident arising "out of" their employment. In *Edwards v. Wingham Agricultural Implement Co.* [2098] and in *Butt v. Provident Clothing and Supply Co.* [2036], it was held that the accident must arise "in the course of" the employment, whilst in *Greene v. Shaw* [2035] and *Rodger v. Paisley School Board* [2038] it was held that although the accident occurred "in the course of," it did not arise "out of," the employment.

If the man is not exposed by the nature of his employment to more risk than the ordinary members of the public, the risk is not "incidental to" the employment. Thus where the accident is caused by an added peril, to which the workman by his own conduct exposes himself, and not by any peril involved by his contract of service, it will not be held to arise out of the employment (*Barnes v. Nunnery Colliery Co.* [2039]). The cases of *Bates v. Mirfield Coal Co.* [2040]; *Plumb v. Cobden Flour Mills Co.* [2041] and the other cases which follow, were decided on similar grounds. In nearly all these cases the workman suffered injury through disobeying some order given for the purpose of preventing accidents, but the mere fact that the act which causes the injury is done contrary to rules will not necessarily be sufficient to prevent a claim for compensation being made (*Johnson v. Marshall* [2163]). This is especially the case where the rules are not clear (*Joyce v. Wellingborough Iron Co.* [2056]; or where it is the practice of the workman to the knowledge of the employers or responsible officials, to ignore such rules (*Logue v. Fullerton* [2192]; *Richardson v. Denton Colliery Co.* [2057])).

Fourthly, as to acts done by a workman for his own purpose. If a workman does an act entirely for his own convenience, and not in the execution of his duty or in the interest of his employers, and

suffers injury by accident, such accident will not be held to arise out of and in the course of his employment (*Reed v. Great Western Railway* [2058]; *Morrison v. Clyde Navigation Trustees* [2059]; *Hendry v. Caledonian Railway* [2060]; *Callaghan v. Maxwell* [2061]; *Revie v. Cumming* [2062]; *Clifford v. Joy* [2069]). With these cases should be contrasted the case of *Goodlet v. Caledonian Railway* [2070], in which it was held that a man who was injured whilst returning to his duty, after a departure from it for a purpose of his own, was within the protection of the Act. The case of *M'Lauchlan v. Anderson* [2071] shows that if a man ceases work for a moment for his own purpose, this will not prevent the accident arising out of and in the course of the employment, so long as such purpose is a natural and necessary one. Similarly, if an act is reasonably necessary, although it be done for the man's own purpose, it will not prevent an accident which results from it from arising out of and in the course of the employment (*Edmunds v. Owners of S.S. Peterston* [2037]).

Fifthly, as to accidents arising through larking. An injury suffered by a man as a consequence of larking, which does not occur in any sense while the workman is doing, or attempting to do, his master's work, will not entitle the applicant to compensation (*Cole v. Evans, Son, Leschner and Webb* [2074]); *Furniss v. Gartside & Co., Ltd.* [2075]. The same principle applies if the accident is due to the larking of a fellow-servant not engaged in his employer's work (*Falconer v. London and Glasgow Engineering Co.* [2076]; *Burley v. Baird* [2078]; *Wilson v. Laing* [2079]), and the workman will not even be entitled to compensation if he attempts to rescue a fellow-workman who is about to be injured owing to such larking (*Mullen v. Stewart* [2081]; see also *McIntyre v. Rodger* [2082]).

“In the Course of” the Employment.

As to the meaning of the words “in the course of employment” The cases which fall under this division of our subject will be dealt with under the following sub-divisions:—

Firstly, the burden of proof required. It is just as necessary for the applicant to prove that the accident arose “in the course of the employment” as that it arose “out of the employment,” and so the principles applying to this part of our subject may be gathered from the cases which deal with burden of proof under the heading “Out of the Employment” (see also *Charvil v. Manser* [2083] on this point). The cases of *Mitchell v. Glamorgan Coal Co.* [2084]; *Jenkins v. Standard Colliery Co.* [2085]; *Fleet v. Johnson* [2086]; *Wright v. Kerrigan* [2088] and *Traynor v. Addie* [2089] show what inferences may be drawn by the arbitrator to entitle him to hold that the accident arose “in the course of” the employment.

Secondly, accidents to workmen on their way to or from work. This question presents some difficulty, as it is often hard to determine when a man's employment begins and ends. A distinction must be drawn between the beginning of a man's employment and the beginning of his actual work (*Webber v. Wansbrough Paper Co.* [2090]; *Holmes v. Great Northern Railway* [2094]). The general rule appears to be that if a workman is injured whilst going to or returning from his work

by a means over which the employers have no control, they will not be liable to him if he be injured by accident (*Holness v. Mackay* [2091]; *Nolan v. Porter & Sons* [2092]; *Walters v. Staveley Coal and Iron Co.* [2093]), but if it is an implied term of the contract of service that the employers should carry the man to and from his work, they are under a duty to carry him properly, and will be liable if he is injured during the journey (*Holmes v. Great Northern Railway* [2094]; *Cremins v. Guest, Keen and Nettlefolds* [2095]; *Walton v. Tredegar Iron and Coal Co.* [2096]; *Mole v. Wadsworth* [2097]; *Edwards v. Wingham Agricultural Implement Co.* [2098]; *Gane v. Norton Hill Colliery Co.* [2099]). The mere fact that a man is upon his employer's premises does not signify that he has entered upon his employment (*Benson v. Lancashire and Yorkshire Railway* [2100]), as each case must depend upon its own facts as to the reasonable interval of time or space during which a workman's employment lasts (*Hoskins v. Lancaster* [2101]; *Williams v. Assheton Smith* [2102]). On the other hand, the moment at which the actual work begins cannot be taken as the true moment of the commencement of the employment, for a reasonable margin must be allowed to the workman for the purpose of getting to the part of the premises where his actual work is to be carried on (*Sharp v. Johnson & Co.* [2103]; *Cross, Tetley & Co. v. Catterall* [2104]; *Fitzpatrick v. Hindley Field Colliery* [2105]). The following cases also illustrate the above principles: *Mackenzie v. Coltness Iron Co.* [2106]; *Anderson v. Fife Coal Co.* [2107]; *Kearon v. Kearon* [2108]; *Cook v. S.S. Montreal* [2109]; *McKee v. Great Northern Railway* [2110]; *Hendry v. United Collieries* [2111]; *Kelly v. Owners of Ship Foam Queen* [2112]; *Gibson v. Wilson* [2113]; *Davies v. Rhymney Iron Co.* [2114]; *Caton v. Summerlee and Mossend Iron Co.* [2115]; *Graham v. Barr and Thornton* [2116]; *Whitbread v. Arnold* [2117]; *Perry v. Anglo-American Decorating Co.* [2118]; *Haley v. United Collieries* [2119]; *Guilfoyle v. Fennessy* [2120]; *Gilmour v. Dorman Long & Co.* [2121].

Thirdly, as to accidents during the dinner hour and other breaks in the employment. A workman is not only under the protection of the Act during his employment, but also during intervals in the employment, provided he uses such intervals in a reasonable manner. Thus accidents which happen during the dinner hour have been held to be within the purview of the statute (*Blovelt v. Sawyer* [2122]; *Rowland v. Wright* [2123]), or other times at which it is reasonable that the man would require food (*Morris v. Lambeth Borough Council* [2124]), or drink (*Keenan v. Flemington Coal Co.* [2125]; *Heywood v. Broadstone Spinning Mill* [2126]); contrast *McKrill v. Howard and Jones* [2127]; see also *Alridge v. Merry* [2128]). If the man stops work for a necessary purpose but goes to an unsuitable place he will not be within the Act (*Thomson v. Flemington Coal Co.* [2129]; *Rose v. Morrison and Mason* [2130]; *Cogden v. Sunderland Gas Co.* [2131]).

Fourthly, accidents arising after the termination of the employment. Although a man's employment usually ceases as soon as he leaves work, yet in certain circumstances he still may have duties to perform in connection with his employment, and if an accident happens to him under such circumstances, it arises out of and in the course of

the employment. Thus a workman going to receive his pay is within the protection of the Act (*Riley v. Holland & Sons* [2132]; *Lowry v. Sheffield Coal Co.* [2133]; *Nelson v. Belfast Corporation* [2134]), for the contractual obligation continues until the wages are paid; and this may even be the case where the relationship of master and servant has ceased (*Molloy v. South Wales Anthracite Colliery Co.* [2135]); but if he goes to his employer's premises in his own interests he will not be within the statute (*Phillips v. Williams* [2136]). So also the special nature of a man's services may place him in the employment of his master from the time he leaves home until the time he returns (*Dickinson v. Barmack* [2137]); but a special agreement which enlarges the liability of the master during the employment does not extend to accidents happening after the termination of the employment (*Poulton v. Kelsall* [2138]).

The cases are grouped as follows:—

(A.) General Principles.

(B.) Out of the Employment.

I. Burden of Proof.

(1) General Principles.

(2) Inferences from Proved Facts.

(3) Unexplained Disappearance of Seamen.

(4) Seamen going Ashore or returning to Ship.

II. Sphere of Employment.

(1) Acting within Sphere of Employment.

(2) Acting outside Sphere of Employment.

(3) Emergency.

III. Risks Incidental and not Incidental to Employment.

(1) Risks incidental to employment.

(a) Tortious acts of a Third Party.

(b) Injury by Weather, Lightning, Sunstroke, Frost, etc.

(c) Injury by Animals.

(d) Street Accidents.

(2) Risks not Incidental to Employment.

IV. Acts done by a Workman for his own Purpose.

V. Larking.

(C.) In the Course of the Employment.

I. Burden of Proof.

II. Accidents to Workmen on their Way to and from Work.

III. Accidents during Dinner Hours and other Breaks in the Employment.

IV. Accidents arising after Termination of the Employment.

(A.) GENERAL PRINCIPLES.

1928.—Smith v. Lancashire and Yorkshire Railway, [1899] 1 Q. B. 141; 68 L. J. Q. B. 51; 79 L. T. 633; 47 W. R. 146; 15 T. L. R. 64—C. A.

A workman in the employment of a railway company as a plate-layer was occasionally engaged in the duty of collecting tickets, and on one occasion, after having completed the collection of tickets, got on to the footboard of a carriage to speak to a passenger. It was found as a fact that he got on to the footboard not for any object of his employers, but only for his own pleasure. In getting off the train after it had started he fell between the platform and the train, and was killed.

HELD—that the accident did not arise out of his employment within the meaning of s. 1, sub-s. 1, of the Workmen's Compensation Act, 1897; that to render an employer liable to pay compensation, the accident must arise not only "out of" but also "in the course of" the employment, and consequently that the railway company were not liable.

1929.—Fitzgerald v. Clarke, [1908] 2 K. B. 796; 77 L. J. K. B. 1018; 99 L. T. 101; 1 B. W. C. C. 197—C. A.

A workman was injured by a practical joke of his fellow-workmen, who placed the hook of a crane in his necktie and lifted him from the ground. The necktie broke and he fell to the ground, receiving serious injuries.

HELD—that he was not entitled to compensation from his employers under the Workmen's Compensation Act, 1906, as the accident did not arise "out of and in the course of the employment."

Per Buckley, L.J.: The words "out of and in the course of the employment" in s. 1 of the Act are used conjunctively, not disjunctively. The words "out of" point to the origin or cause of the accident; the words "in the course of" point to the time, place, and circumstances. The accident, to give rise to compensation, must be in some sense due to the employment.

Notes.—*Armitage v. Lancashire and Yorkshire Railway Co.*, [1902] 2 K. B. 178 [2015], followed. *Pomfret v. Lancashire and Yorkshire Railway* [1932] explained. *Challis v. London and South Western Railway Co.*, [1905] 2 K. B. 154 [2013]; *Andrew v. Failsworth Industrial Society*, [1904] 2 K. B. 32 [2021]; *Fenton v. Thorley*, [1903] A. C. 443 [1839], and *Brintons v. Turvey*, [1905] A. C. 230 [1852], discussed.

1930.—Kitchenham v. S.S. Johannesburg (Owners), [1911] 1 K. B. 523; 80 L. J. K. B. 313; 103 L. T. 778; 4 B. W. C. C. 91; 55 S. J. 124; 27 T. L. R. 124—C. A. Affirmed by the House of Lords, [1911] A. C. 417; 80 L. J. K. B. 1102; 105 L. T. 118; 27 T. L. R. 504; 55 S. J. 599; 4 B. W. C. C. 311—H. L.

By going on shore with leave a seaman does not interrupt the course of his employment, but any accident that occurs during the

period of his being on shore is generally, if not necessarily, due to a danger to which he is exposed as a member of the public, and not as one of the crew of the ship, and therefore is one which does not arise "out of" his employment. But if, whether in his hours of leisure or not, it becomes necessary for him in fulfilment of his employment to get on board his vessel, an accident which occurs in his doing so is normally an accident arising out of his employment, because it is due to a danger incidental to his service in that ship. The return to the ship is in the course of his employment, but the risks do not become risks arising out of his employment until he has to do something specifically connected with his employment on the ship. Thus, if the risk is one due to the means of access to the ship the accident is rightly said to arise out of his employment; but if the accident is shown to arise from something not specifically connected with the ship, it cannot be said to arise out of his employment.

A sailor, having been on shore with leave, when returning to his ship fell into the water and was drowned. The access to the ship from the quay was by a gangway, which was properly lighted. There was no evidence whether he had or had not reached the gangway when he fell.

Held—that it was not proved that the accident arose out of his employment.

Notes.—Lord Loreburn, L.C. ([1911] A. C., at p. 417), said: "It is another of the very numerous cases in which the question is whether an accident arose 'out of and in the course of' the workman's employment, words which admit of inexhaustible varieties of application according to the nature of the employment and the character of the facts proved. The facts in different cases are infinitely different; and if we were upon each argument to discuss them and differentiate one from another, judgments in courts of law would be interminable and would lead rather to confusion than to enlightenment. *Moore v. Manchester Liners*, [1910] A. C. 498 [1965], referred to.

1931.—*Leach v. Oakley Street & Co.*, [1911] 1 K. B. 523; 80 L. J. K. B. 313; 103 L. T. 779; 55 S. J. 124; 27 T. L. R. 124; 4 B. W. C. C. 91—C. A.

A sailor who had been on shore with leave was returning to his ship; there was another ship lying between the quay and his own ship, and to get to the latter he had to cross a gangway between the two ships; he reached the gangway and while crossing it was drowned.

HELD—that the deceased met his death by an accident arising out of and in the course of his employment.

Notes.—This case was heard by the Court of Appeal together with *Kitchenham v. Johannesburg (Owners)* [1930]. *Moore v. Manchester Liners* [1910] A. C. 498 [1965], followed.

B. OUT OF THE EMPLOYMENT.

I. *Burden of Proof.*

N.B.—See sub-tit. “Personal Injury by Accident,” V. “Burden of Proof.”

(1) *General Principles.*

1932.—*Pomfret v. Lancashire and Yorkshire Railway*, [1903] 2 K. B. 718; 72 L. J. K. B. 729; 89 L. T. 176; 52 W. R. 66; 19 T. L. R. 649—C. A.

In an arbitration under the Workmen's Compensation Act, 1897, the burden is upon the applicant to prove that the injury was caused by accident arising “out of” as well as “in the course of” the employment of the workman, and if the applicant leaves the case in doubt as to whether those conditions are fulfilled or not, the evidence being equally consistent with their being fulfilled or not fulfilled, he has not discharged the burden of proof.

A workman in the employ of a railway company was in the course of his employment travelling in an ordinary compartment of a passenger train. Persons travelling in the same compartment gave evidence that they saw him put the window down and place his basket in the rack, standing close to the door with his face towards it, but that they did not see him do anything else, until, when the train had travelled three hundred yards only from the place at which he entered it, they heard a crash, and he had disappeared. The workman was found lying close to the rail suffering from injuries which caused his death.

HELD—that there being evidence that the workman was simply passing as an ordinary passenger might pass, and acting as an ordinary passenger might act, in a train upon a railway, there was evidence on which the county court judge was justified in finding that the accident arose “out of” as well as “in the course of” his employment.

Notes.—Collins, M.R., in his judgment considered at length the effect of *Wakelin v. London and South Western Railway* (1886), 12 App. Cas. 41, and distinguished it from the present case as follows: “It is not a similar case to *Wakelin v. London and South Western Railway*, where there was merely the naked fact that the body of the deceased was found lying on the line near a level crossing, and there was no presumption as to negligence one way or the other; in that case it was held, and I entirely agree with the decision, that the *onus* of establishing the fact that the man's death was caused by the negligent act of the defendants had not been discharged by the plaintiff, and that therefore, she could not recover.”

1933.—*O'Brien v. Star Line, Ltd.*, [1908] S. C. 1258; 45 Sc. L. R. 935; 16 S. L. T. 292; 1 B. W. C. C. 177—Ct. of Sess.

In an application for compensation under the Workmen's Compensation Act, 1906, the *onus* is on the claimant to prove that the accident arose out of and in the course of the workman's employment.

A fireman whose duty it was to remain on board the ship where

he was employed went ashore without permission, and returned to the ship in the evening intoxicated. In the morning he was found fatally injured at the bottom of a hold. The only access to the hold was in a part of the vessel where the fireman had no right to be, through a door which was kept locked, but which had been broken open. In a claim for compensation brought by dependants of the fireman, the above facts were proved. There was no evidence to show how the door of the hold had been broken open, or how the fireman had got to the hold, or how the accident had happened.

HELD—that the claimants had failed to prove that the accident arose out of and in the course of the fireman's employment; and accordingly that they were not entitled to compensation.

Notes.—*Pomfret v. Lancashire and Yorkshire Railway* [1932] applied.

1934.—*Gilbert v. Steam Trawler Nizam (Owners)*, [1910] 2 K. B. 555; 79 L. J. K. B. 1172; 103 L. T. 163; 26 T. L. R. 604; 3 B. W. C. C. 455—C. A.

The second engineer of a ship lying in dry dock went ashore to get his dinner, and returning to the ship in the company of the first engineer was last seen speaking to a young man at the side of the dry dock in which his dead body was afterwards found.

HELD—that there was not sufficient evidence to show that the accident arose out of and in the course of his employment.

Notes.—*Bender v. S.S. Zent (Owners)*, [1909] 2 K. B. 41 [1955]; *Marshall v. Owners of S.S. Wild Rose*, [1909] 2 K. B. 46 [1901], followed. *Cremins v. Guest, Keen and Nettlefolds*, [1908] 1 K. B. 469 [2095]; *Gane v. Norton Hill Colliery Co.*, [1909] 2 K. B. 539, at p. 545 [2099], referred to.

1935.—*Millers v. North British Locomotive Co.*, [1909] S. C. 698; 46 Sc. L. R. 755; (1909), 1 S. L. T. 519; 2 B. W. C. C. 80—Ct. of Sess.

A craneman, whose duty it was to attend to two travelling cranes in an engineering shop, was crushed to death while on another crane on to which he had climbed. His dependants claimed compensation. In the arbitration proceedings it was found that he had no right to be on the crane on which he met his death, and there was no evidence to show why he went there.

HELD—that the claimants had failed to prove that the accident arose out of and in the course of the deceased's employment, and accordingly that they were not entitled to compensation.

Notes.—*Grant v. Glasgow and South-Western Railway*, [1908] S. C. 187 [1941], distinguished. *Reed v. Great Western Railway Co.*, [1909] A. C. 31 [2058], applied. *Mackinnon v. Miller*, [1909] S. C. 373 [1953]; *O'Brien v. Star Line Co.*, [1908] S. C. 1258 [1933], referred to.

1936.—Dyhouse v. Great Western Railway, [1913] W. C. & I. Rep. 491; 6 B. W. C. C. 691—C. A.

An engine driver, who by the rules of the railway company was forbidden while on duty to leave his engine unless it was absolutely necessary to do so, left his engine while standing in a siding and was killed by another engine passing. The arbitrator found that he left his engine for some unknown reason which might or might not be consistent with his employment, and awarded compensation in favour of the workman's dependant.

HELD—that upon the arbitrator's finding the applicant had not discharged the burden of showing that the accident arose "out of and in the course of" the deceased man's employment, and she was therefore not entitled to compensation.

Notes.—*Mitchell v. Glamorgan Coal Co.*, 23 T. L. R. 583 [2084], distinguished on the ground (*per* Cozens-Hardy, M.R.) that "in that case there was an irresistible inference that the accident happened to the man in the colliery."

1937.—Smith v. Stanton Ironworks Co. Collieries, Ltd. (1913), 6 B. W. C. C. 239; [1913] W. C. & I. Rep. 186—C. A.

A lad was employed to control a motor by means of a switch-board, and to clean the engine when stationary and when so ordered. The engine was fenced off. Without known reason he got through the fence when the engine was in motion, and was killed by being caught in a cog-wheel.

HELD—that the dependant had not discharged the burden of proving the accident arose out of and in the course of the employment.

1938.—Sherwood v. Johnson (1912), 5 B. W. C. C. 686; [1913] W. C. & I. Rep. 57—C. A.

A gamekeeper handled dead animals on July 31st, August 2nd, 3rd and 5th. The animals he handled on July 31st and August 5th were handled in the course of his employment, but not those on August 2nd and 3rd. The animal he handled on August 5th, a dog, was proved to have died from anthrax; there was no evidence as to what the other animals died of. On August 11th the man fell ill, and died on August 18th. The county court judge found that the deceased did not die from an accident, and that if he did the accident was not proved to have arisen out of the employment.

HELD—that the burden of proof was upon the applicant and that this had not been discharged.

Notes.—*Broderick v. London County Council*, [1908] 2 K. B. 807; 1 B. W. C. C. 219 [1860], explaining *Fenton v. Thorley*, [1903] A. C. 443 [1839], referred to as showing that a disease is something which does not in itself connote the idea of an accident at all. *Eke v. Hart-Dyke*, [1910] 2 K. B. 677 [1861]; and *Brintons, Ltd. v. Turvey*, [1905] A. C. 230 [1849], cited.

(2) *Inferences from Proved Facts.*

1939.—**Evans & Co. v. Astley**, [1911] 1 K. B. 1036; 80 L. J. K. B. 731; 104 L. T. 373; 4 B. W. C. C. 209—C. A. affirmed, [1911] A. C. 674; 80 L. J. K. B. 1177; 105 L. T. 385; 27 T. L. R. 557; 4 B. W. C. C. 319—H. L.

A brakesman, who was in charge of a train that was running buffer to buffer with and pushing another train towards some siding points, endeavoured to climb from the truck in which he was riding on to the brake van of the first train, and in doing so fell and was killed. The points would have had to be operated by one of the brakesmen.

HELD by C. A. (Buckley, L.J., *diss.*) and by H. L. (Lord Atkinson *diss.*)—that there was evidence from which the arbitrator could infer that the deceased was trying to climb into the brake van with a view to alighting therefrom for the purpose of attending to the points, and that the accident arose “out of and in the course of the employment” and that the dependants were entitled to compensation.

Per Cozens-Hardy, M.R.: In considering what is sufficient evidence in a fatal accident to justify an inference that the accident has arisen “out of and in the course of the employment” a distinction must be drawn between cases where death occurs at a time when the workman is engaged in his employer’s work and cases where death occurs at a time when the workman is free, without any breach of contract, to do what he pleases on his own account.

Per Moulton, L.J.: Where the workman is engaged in his employer’s work up to the time of his death, and the last acts known about him are consistent with the continuance of that work, the *onus* is on those who allege a cessation of his work for his employer to prove it.

Notes.—Lord Atkinson, in his dissentient judgment, pointed out that one not infrequently finds, in cases under this Act, surmises more or less shrewd of this arbitrator or judge, or conjectures more or less plausible, described as inferences of fact, although there are no data whatever from which the so-called inferences can reasonably be drawn, and in his view the present case was one of that description, and thus came within *Wakelin v. London and South Western Railway Co.*, 12 App. Cas. 41. The majority of the judges in the House of Lords, however, held that there was sufficient evidence to support the inference of the arbitrator.

1940.—**McNicholas v. Dawson**, [1899] 1 Q. B. 773; 68 L. J. Q. B. 470; 80 L. T. 317; 47 W. R. 500; 15 T. L. R. 242—C. A.

The burden of proving that an accident arose out of and in the course of the workman’s employment lies on the plaintiff; but the burden of proving serious and wilful misconduct lies on the defendant.

A workman employed by the defendants to attend to a steam engine within a shed and to a mortar pan outside the shed worked by the steam engine and used to grind mortar for a building, was seen to start the engine. Very shortly afterwards he was found involved in the machinery, whereby he was killed. The shed had two doors,

one of which was safe; the other, a small one, used occasionally for ventilating the shed, was dangerous by reason of proximity to a revolving shaft, and the man had been forbidden to use it. It appeared that the man was approaching the small door when he met with the accident.

HELD—that there was evidence that the accident arose out of and in the course of his employment.

Notes.—This was a decision under s. 7 of the Workmen's Compensation Act, 1897, and ss. 4 and 23 of the Factory and Workshop Act, 1895. *Smith v. Lancashire and Yorkshire Railway*, [1899] 1 Q. B. 141 [1928], cited.

1941.—*Grant v. Glasgow and South-Western Railway*, [1908] S. C. 187; 45 Sc. L. R. 128; 15 S. L. T. 585; 1 B. W. C. C. 17—Ct. of Sess.

A station policeman in the employment of a railway company was run down by an engine on a siding at the station and died shortly afterwards of his injuries. His widow and children claimed compensation under the Workmen's Compensation Act, 1897, from the railway company. There was no evidence to show how or why he came to be at the spot where he was injured, but he might legitimately have been there in the course of his duties as station policeman.

HELD—that the presumption was that the deceased had been injured by accident arising out of and in the course of his employment, and that in the absence of evidence to the contrary this must be taken to be the fact.

1942.—*Sheehy v. Great Southern and Western Railway Co.* (1913), 47 I. L. T. 161; [1913] W. C. & I. Rep. 404—C. A. (Ir.).

A guard on a train between station A. and junction B. arrived at the junction at 11.8 a.m., and was there relieved of duty until 7.30 p.m., when he was to travel back with the train on its return journey, but according to the instructions issued to him for the day's work, he was to remain at the junction for the return train. Within this interval he sat on a buffer stop to rest himself, and was next seen lying between the rails with a wound on his head and other injuries. He died on the next day.

HELD (Cherry, L.J., *diss.*)—that the deceased met his death by an accident arising out of and in the course of his employment.

Notes.—*Craske v. Wigan*, [1909] 2 K. B. 635 [2030]; *Amy's v. Barton*, [1912] 1 K. B. 40 [2031]; *Marshall v. S.S. Wild Rose (Owners)* [1910] A. C. 486 [1901], referred to.

1943.—*Furnivall v. Johnson's Iron and Steel Co., Ltd.* (1911), 5 B. W. C. C. 43—C. A.

A workman in an ironworks went from his furnace to the blacksmith's shop, the route running along a canal bank. Not returning, he was sought for, but not found. Some hours later, he was found drowned in the canal. The county court judge, in the absence of

direct evidence as to how the man came to be in the canal inferred that the accident arose out of the employment, and awarded compensation.

HELD—there was evidence to support the finding.

Suicide, being a crime, cannot be inferred, *per* Farwell, L.J.

1944.—Bines (or Brines) v. Gueret, Ltd., [1913] W. C. & I. Rep. 158 ; 6 B. W. C. C. 120—C. A.

A workman was employed as a barge boatman, and his duties were to bring empty barges down a canal and take full barges up. He was last seen walking away with a boathook over his shoulder from an empty barge which he had just tied up. A few minutes later he was found drowned in the canal about ninety yards away from where he was last seen. A boat hook was found about twenty yards away from his body hanging from the stem of a barge which did not belong to his employers.

HELD—that the county court judge was justified in holding that he was not entitled to infer that the death of the man was due to an accident arising “out of and in the course of the employment” within s. 1 of the Workmen’s Compensation Act, 1906.

1945.—Wright v. Scott (1912), 5 B. W. C. C. 431 ; [1912] W. C. Rep. 311—C. A.

A groom was thrown from a horse which he was exercising, and which, there was some evidence, he had been told to lead, but not to ride. He lost the sight of one eye and suffered other injuries. The county court judge found that the accident arose out of and in the course of the employment.

HELD—there was evidence to support the finding.

1946.—Groves v. Burroughes and Watts, Ltd. (1911), 4 B. W. C. C. 185—C. A.

A workman who had undergone an operation returned to work before the operation wound was completely healed, with instructions not to strain himself. He worked at the lever of a machine. A fellow workman, noticing that the machine was stopped, looked for the man, and saw that he was talking to the foreman some yards away. It was then seen that blood was flowing freely from the operation wound and soaking into his boots. Septic poisoning followed, and the man died.

HELD—that there was evidence on which the county court judge could draw an inference that the accident arose out of the employment.

Notes.—*Clover, Clayton & Co. v. Hughes*, [1910] A. C. 242 [1879], referred to. *Trodden v. McLennard*, 4 B. W. C. C. 190 [1881], should be compared with the above case.

1947.—Stapleton v. Dinnington Main Coal Co., Ltd. (1912), 107 L. T. 247 ; 5 B. W. C. C. 602 ; [1912] W. C. Rep. 376—C. A.

On the morning of August 14th, 1911, a collier started at his work in his employer’s coal mine, having made no complaint to any

one, not did any one see him walking as if there was anything the matter with his feet. Later on he came out of the stall where he had been working and complained to the headman that his foot hurt him. The headman found in the stall a piece of rock, weighing about three or four pounds, on the floor, which had fallen from the roof during the working hours. On August 19th a doctor examined the foot and found a small wound of a kind that might have been caused, in the doctor's opinion, by a piece of stone falling on it. A scratch or nearly healed scar on the sole of the foot was also discovered. On August 25th the workman was found to be suffering from tetanus, from which he died the next day. The county court judge decided that the more probable conclusion from the evidence was that an accident had happened to the deceased arising out of and in the course of his employment, the inference to be drawn therefrom being that the wounds on his foot were caused by the fall of the stone; and that therefore his death was caused by that accident.

HELD—that there was evidence to support the finding of the county court judge.

Notes.—*Hawkins v. Powells Tillery Steam Coal Co., Ltd.*, [1911] 1 K. B. 988 [1894], referred to in judgment in the Court of Appeal. The county court judge in his judgment followed the rule laid down in *Evans & Co. v. Astley*, [1911] A. C. 674, at p. 678 [1939].

1948.—*Sneddon v. Greenfield Coal and Brick Co.*, [1910] S. C. 362; 47 Sc. L. R. 337; [1910] 1 S. L. T. 145; 3 B. W. C. C. 557—Ct. of Sess.

In an arbitration under the Workmen's Compensation Act, 1906, arising out of the death of a miner, it was proved that the miner, in descending the pit to go to his work, had left the cage at an intermediate level before it reached the level at which he was working; that he tried to get back into the cage, but that it had resumed its descent and that he descended to the next level by means of an adjacent blind pit; that he then for some unexplained reason proceeded 600 or 700 feet along a road leading in the opposite direction from the road leading to his work, and there met his death by scalding from the exhaust steam from a pump. On these facts the arbitrator found that the accident had not arisen "out of and in the course of" the employment.

HELD—that there was no evidence from which the arbitrator could properly arrive at that conclusion, and that the court were consequently entitled to review his finding.

Notes.—*Mackinnon v. Miller*, [1909] S. C. 373 [1953], cited with approval, in which case the Lord President expressed his views as to the function of the court in reviewing the arbiter's decision in cases of this kind as follows: "Your Lordships are not judges of fact, and you will only, of course, interfere with the arbiter's decision if it be shown that he has come to an erroneous decision upon fact either by being influenced in coming to his decision on fact by some erroneous view in law—a result which is possible—or by having, as it is sometimes expressed, misdirected himself; or further, if he has

proceeded entirely contrary to evidence or upon no evidence at all. In fact, the position which your Lordships here hold is very analogous to, if not entirely the same as, the position which you hold in reviewing the verdict of a jury." *Low v. Jackson v. General Steam Fishing Co.*, [1909] S. C. (H. L.) 37 [1959], referred to.

1949.—Chandler v. Great Western Railway Co. (1912), 106 L. T. 479 ; 5 B. W. C. C. 254 ; [1912] W. C. Rep. 169—C. A.

A workman, while at his home, cut the forefinger of his right hand slightly with an ordinary clean household knife. He sucked the wound, bound it up with a clean rag, and afterwards returned to his work as fireman on a railway. While so engaged, coal dust, oil, grease, and other noxious matter worked through the bandage into the cut. Septic infection supervened, and eventually the forefinger had to be amputated.

HELD—that to attribute the septic infection to the workman's employment was at best a mere surmise, conjecture, or guess, there being many possible sources of infection ; and that therefore the workman's claim under the Workmen's Compensation Act, 1906, for compensation failed.

Notes.—In this case the rule in *Barnabas v. Bersham Colliery Co.*, 103 L. T. R. 513 [1893], that the workman cannot succeed unless he can "do something more than show a state of facts which is consistent either with one view or with another view," applied. *Hawkins v. Powells Tillery Steam Coal Co., Ltd.*, [1911] 1 K. B. 988 [1894], referred to. *Brintons, Ltd. v. Turvey*, [1905] A. C. 230 [1849], distinguished on the ground that in that case there was a special risk attached to the employment, and the anthrax germ, as a matter of evidence and general knowledge, must have come from the work in which the workman was engaged.

1950.—Fennah v. Midland Great Western Railway of Ireland (1911), 45 I. L. T. 192 ; 4 B. W. C. C. 440—C. A. (Ir.).

An engine driver was engaged whilst his train was at a railway station in tightening a nut in the engine ; he had one knee on the engine frame and one foot on the platform. He was next seen lying on the permanent way between the engine and platform with his two legs "doubled up." He exhibited signs of agony, and died within five minutes of the occurrence. There was no evidence to show what caused him to fall to the permanent way, but, on the hearing of the widow's claim for compensation, evidence was given showing that on at least three previous occasions, when the train was at a station, the deceased had collapsed in a faint and lay unconscious for some minutes. From the medical evidence, however, it appeared that he "undoubtedly had a sound heart." A few days before the occurrence the deceased was examined by the physician of the company, and was presumably passed as physically fit for his position.

HELD—(Holmes, L.J., *dubitante*) that there was sufficient evidence to justify the finding of fact by the county court judge that the man's death resulted from injury by accident arising out of and in the course of his employment.

Notes.—The Lord Chancellor in his judgment said the test by which the case is to be tried is succinctly stated by Lord Loreburn in *Clover, Clayton v. Hughes*, [1910] A. C., at p. 227 [1879]. He says: "Nor do I think we should attach any importance to the fact that this man's health was as described. . . . I am bound by the finding if there was any evidence to support it." *Wicks v. Dowell & Co.*, [1905] 2 K. B. 225 [2027]; *Ismay v. Williamson*, [1908] A. C. 43 [1852], cited; *Hawkins v. Powells Tillery Steam Coal Co.*, [1911] 1 K. B., at p. 996 [1894] and *Barnabas v. Bersham Colliery Co.*, 3 B. W. C. C. 216 [1893], discussed.

(3) *Unexplained Disappearance of Seamen.*

1951.—*Owners of Ship Swansea Vale v. Rice*, [1912] A. C. 238; 81 L. J. K. B. 672; 104 L. T. 658; 27 T. L. R. 440; 55 S. J. 497; 12 Asp. M. C. 47; 4 B. W. C. C. 298; 48 Sc. L. R. 1095; [1912] W. C. Rep. 242—H. L.

The unexplained disappearance from a ship at sea of a seaman on duty as officer of the watch:

HELD—a sufficient ground for inferring that he accidentally fell overboard and met his death by accident arising out of his employment within the meaning of the Workmen's Compensation Act, 1906.

Decision of C. A. (102 L. T. 270; 26 T. L. R. 276; 3 B. W. C. C. 152) affirmed.

Notes.—Lord Shaw, in his judgment stated that he was inclined to agree with the judgment in *Mackinnon v. Miller* [1953], and pointed out that in *Marshall v. S.S. Wild Rose (Owners)*, [1910] A. C. 486 [1901], he specially reserved the case of a sailor whose life is sacrificed under circumstances of mystery. Lord Loreburn, L.C., said: "What you want is to weigh probabilities, if there be proof of facts sufficient to enable you to have some foothold or ground for comparing and balancing probabilities at their respective value, the one against the other." If you exclude the possibility of suicide or murder, it must have been an accidental falling overboard, and there was an injury by accident in the course of his employment. Was it an injury by accident arising out of his employment? . . . If you weigh the probabilities one way or the other, the probabilities are far greater that this man perished through an accident arising out of and in the course of his employment."

1952.—*Lee v. Stag Line, Ltd.* (1912), 107 L. T. 509; 55 S. J. 720, 5 B. W. C. C. 660; [1912] W. C. Rep. 398—C. A.

A fireman during his watch in the tropics disappeared.

HELD—that on the facts there was evidence to justify a finding that the man having come on deck for air fell overboard, and that the accident arose out of and in the course of his employment.

Notes.—*Swansea Vale v. Rice* [1951] referred to as showing that mere surmise is not enough.

1953.—Mackinnon v. Miller, [1909] S. C. 373; 46 Sc. L. R. 299; (1909), 1 S. L. T. 65; 2 B. W. C. C. 64—Ct. of Sess.

An engineer employed on a tug was seen in his bunk on board the tug (which was then lying moored to a barge which was moored to a jetty) in the early morning. An hour later it was found that he had disappeared, leaving his working clothes beside his bunk. Two days later his body, clothed in night dress, was found by a diver in the sea near the place where the tug had been moored. According to the medical evidence the deceased's death was due to drowning, but there was no evidence as to how he met his death. The deceased was a man of cheerful disposition and of steady habits, and his death was not caused by suicide.

HELD—that the arbitrator was entitled to draw the inference that the deceased's death was due to an accident arising out of his employment.

Notes.—This case is also mentioned on another point [2437]. *Pomfret v. Lancashire and Yorkshire Railway* [1903] 2 K. B. 718 [1932], and *McDonald v. S.S. Banana (Owners)*, [1908] 2 K. B. 926 [1966], referred to as good illustrations of the contrast which occurs upon facts in cases of this kind. *O'Brien v. Star Line*, [1908] S. C. 1258 [1933], distinguished, since in that case the man was found lying at the bottom of a hold into which he could only have got by going into a part of the ship where he had no business. *Reed v. Great Western Railway*, [1909] A. C. 31 [2058], referred to.

1954.—Gatton v. Limerick Steamship Co., [1910] 2 Ir. R. 561; 441 L. T. 141—C. A.

In a claim for compensation under the Workmen's Compensation Act, 1906, the burden of proving that the accident arose out of and in the course of the employment rests on the applicant even when claiming as dependant of a deceased workman; and the county court judge's decision on questions of fact is conclusive, at least where upon the facts proved or admitted there are circumstances from which he could reasonably draw the inference on which his conclusion is based. Accordingly, where the evidence is as much consistent with the accident having arisen out of and in the course of the workman's employment as with the contrary, and the county court judge draws the inference that it did not so arise, and dismisses the application, the Court of Appeal cannot interfere with his decision.

Notes.—In the judgments in this case the following English and Scotch decisions on the question of burden of proof, and of the power of the county court judge to make findings of fact in this kind of case, were considered: *Pomfret v. Lancashire and Yorkshire Railway* [1903] 2 K. B. 718 [1932]; *McDonald v. S.S. Banana (Owners)* [1966]; *Marshall v. Owners of S.S. Wild Rose*, [1909] 2 K. B. 46 [1901]; *Bender v. S.S. Zent (Owners)* [1955]; *Grant v. Glasgow and South Western Railway*, 45 Sc. L. R. 128 [1941]; *Smith v. Lancashire and Yorkshire Railway* [1899] 1 Q. B. 141 [1928]; *Eyre v. Houghton Main Colliery Co.*, [1910] 1 K. B. 695 [2722]; *Mitchell v. Glamorgan Coal Co.*, 23 T. L. R. 588 [2084]. *Low or Jackson v. General Steam Fishing Co.* [1959] distinguished on the ground

that in that case the arbitrator found as a fact that the accident arose out of and in the course of the deceased's employment.

1955.—Bender v. S.S. Zent (Owners) [1909] 2 K. B. 41; 78 L. J. K. B. 533; 100 L. T. 639; 2 B. W. C. C. 22—C. A.

The *onus* is on the dependant who claims compensation to prove affirmatively that the accident arose "out of," as well as "in the course of," the workman's employment.

The unexplained disappearance on the high seas of a ship's cook who was last seen on the deck in calm weather does not justify the inference of fact that he met with an accident arising "out of" his employment.

Notes.—*Grant v. Glasgow and South Western Railway*, 45 Sc. L. R. 128 [1941], distinguished on the ground that in that case there was an irresistible inference that the accident arose not only "in the course of" his employment but "out of" it. *Mitchell v. Glamorgan Coal Co.*, 23 T. L. R. 588 [2084]; *Moore v. Manchester Liners* [1965] referred to.

1956.—Burwash v. Leyland & Co., Ltd. (1912), 28 T. L. R. 546; 56 S. J. 703; 107 L. T. 735; 5 B. W. C. C.; [1912] W. C. Rep. 400—C. A.

The cook on board the appellant's vessel at sea was seen at work in his galley about 6 a.m. on December 28th, 1911. He left his work and was not seen again. He was not in good health, and probably had gone from the galley on to the upper deck near the steward's lavatory, and being in that neighbourhood might have fallen over the rail into the sea, which was rough at that time. In a claim for compensation by his dependants the county court judge found that the man went overboard, that he was suffering from something that would lead to his going frequently to the lavatory, and that his going there would be arising out of and in the course of his employment; he therefore drew the inference that the deceased accidentally fell overboard.

HELD—that it had not been established that the accident arose out of and in the course of the employment, and therefore that the dependants were not entitled to compensation.

Notes.—*Per Cozens-Hardy, M.R.*: "In the present case there being no evidence as to how the deceased got out of his galley in the course of his duty, and there being no evidence from which to infer as to how the deceased went into the sea, we are asked to say that the very probable state of things is that the deceased, who was not in health, may have gone up from the galley on to the upper deck to the urinal, and being in that neighbourhood, he may have fallen over the rail three feet six inches high, into the sea. That resembles very much a 'possibility upon a possibility.' We have to infer his going to the urinal, and that that was the particular place at which he fell into the sea." Kennedy, L.J., pointed out in the course of his judgment, that "each of these cases must be decided on its own facts." *Bender v. S.S. Zent (Owners)* [1955] referred to.

1957.—**Lendrum v. Ayr Steam Shipping Co.**, [1913] S. C. 331 ; [1913] W. C. & I. Rep. 10 ; 50 Sc. L. R. 173 ; 5 B. W. C. C. 326—Ct. of Sess.

In a claim for compensation by the dependants of a ship steward, who was last seen alive in his bunk, and was found drowned next day in the harbour near to the place where his ship had been lying, the arbitrator awarded compensation.

HELD (Lord Guthrie *diss.*)—that there was no evidence to justify the inference that the accident which caused death arose out of the employment.

Notes.—Lord Dundas in his judgment after considering the effect of *Mackinnon v. Miller* [1953] ; *Swansea Vale v. Rice* [1951] ; *Lee v. Stag Line Co.* [1952] ; *Bender v. S.S. Zent* [1955] ; *Marshall v. S.S. Wild Rose* [1901] ; and *Burwash v. Leyland & Co.* [1956], said : “ The weight of the authorities now reviewed seems to be in favour of the employers in the case before us. I think one may deduce from the decisions (1) that the burden is always upon the applicant to prove that death resulted from an accident arising out of as well as in the course of the employment ; (2) that such proof need not be by direct, but may be by circumstantial evidence ; but there must be facts from which an inference can be drawn, as distinguished from mere conjecture, surmise or probability ; and (3) that an award by an arbitrator cannot stand unless the facts found are such as to entitle him reasonably to infer his conclusion from them.”

(4) *Seamen going Ashore or returning to Ship.*

N.B.—See *Kitchenham v. S.S. Johannesburg (Owners)* [1930] and *Webber v. Wansbrough Paper Co.* [2090].

1958.—**Fletcher or Hewitt v. Owners of S.S. Duchess**, [1911] A. C. 671 ; 81 L. J. K. B. 33 ; 55 S. J. 598 ; 4 B. W. C. C. 317 ; *sub nom. Hewitt v. Owners of S.S. Duchess*, 105 L. T. 121 ; 49 Sc. L. R. 627—H. L.

The captain of a small coasting vessel went ashore in the evening, and, after going to an hotel not far from the quay, returned to the quay, and hailed a boat to come from the ship to take him aboard. While waiting for the boat, he fell into the water and was drowned. The evidence was equally consistent with his having gone ashore on ship's business or for his own purposes.

HELD (affirming the Court of Appeal, *sub nom. Hewitt v. Owners of S.S. Duchess*, [1910] 1 K. B. 772)—that the risk from which the man perished was not one specially connected with his employment, such as might be a risk from crossing a plank or a gangway leading to the ship or going in a boat to the ship, and that the applicant had not discharged the *onus* of proving that the accident arose out of and in the course of his employment.

Notes.—In his judgment in the Court of Appeal Cozens Hardy, M.R., said : “ No doubt for the purposes of his duties the captain may have to go ashore, and go on to the quay . . . but that does not make the quay a part of the ambit or area of his duties any

more than it would make the high street a part of the ambit of those duties. That being so, if the case of *Low v. General Steam Fishing Co.* [1952] is out of the way, it seems to me the decisions of this court in the cases of *Macdonald v. S.S. Banana (Owners)* [1966], *Moore v. Manchester Liners* [1965], and *Robertson v. Allen Brothers* [1963]—no one of which was in any way challenged or differed from in the House of Lords—binds us absolutely to say that the inference the learned judge drew, or the conclusion which he drew, that the man when he got back to the quay must be taken as though he had got back to the ship, cannot be maintained in law." Fletcher-Moulton, L.J., held a different view of the principles applicable, and said, in [1910] 1 K. B., at p. 776: "There are two possible views; one is that if, when he has thus lawfully gone on shore, he succumbs in returning to his duty to one of the perils due to his occupation, the accident (which admittedly is in the course of his employment) arises out of it because it arises by reason of his duty to return to the ship when he has been lawfully absent. The other view is that the ship is the sole *locus* of his duties, and that, unless it can be shown that he has gone on shore on the ship's business, he does not come within the purview of the Act, however much, in fact, the death or injury has been due to perils of the sea in getting from the shore to the ship. In my opinion this court has decided that the latter is the law. My own personal view, as shown by my judgment in *Moore v. Manchester Liners* [1965], is very much the other way." Lord Moulton's view was the one accepted in the House of Lords, for Lord Loreburn, L.C., who delivered the judgment of the House said ([1911] A. C. 673): "I think that the risk from which he perished was not one specially connected with his employment, such as may be the risk of crossing a plank or gangway leading to the ship or of going in a boat to the ship."

1959.—*Low or Jackson v. General Steam Fishing Co.*, [1909] A. C. 523; [1909] S. C. (H. L.) 37; 78 L. J. P. C. 148; 101 L. T. 401; 53 S. J. 763; 25 T. L. R. 787; 2 B. W. C. C. 56—H. L. (Sc.).

The appellant's husband was engaged in watching trawlers in the service of the respondents. His shift of work lasted for twenty-five hours, and he had to find his own refreshment. His duties were discharged partly on the quay and partly on one or other of the trawlers. One evening during his working hours he went to an hotel close at hand, and on his return, in attempting to board one of the trawlers, he fell into the water and was drowned.

HELD (the Lord Chancellor (Lord Loreburn) and Lord Gorell *diss.*)—that the accident arose "out of and in the course of" his employment, for when the accident occurred he had returned to the quay which was the scene or sphere of his duty.

Quære, must a party who claims compensation prove affirmatively not only that the accident happened during the employment, but also out of and in the course of the employment? And if the facts proved are equally consistent with the existence or non-existence of these essential conditions must the applicant fail?

Notes.—The majority of the court were of the opinion that this

case fell within the principle of *Robertson v. Allan Brothers & Co.* [1963], the authority of which was recognised in *Moore v. Manchester Liners* [1965]. *Reed v. Great Western Railway*, [1909] A. C. 81 [2058], distinguished. *McDonald v. S.S. Banana (Owners)* [1966]; *Smith v. Lancashire and Yorkshire Railway*, [1899] 1 Q. B. 141 [1928]; *Wakelin v. London and South Western Railway Co.* (1886), 12 App. Cas. 41, referred to.

1960.—Richardson v. S.S. Avonmouth (Owners) (1912), 5 B. W. C. C. 34—C. A.

A ship in dock was moored to a jetty. The watchman on board had to attend to the ship and moorings. He was seen ashore one evening, with a parcel, at a time when he was accustomed to attend to the shore end of the mooring ropes. The next morning he was found drowned in the dock at a point forty yards from the ship, between the gangway and the shore end of the mooring ropes. The parcel was found between the mooring ropes and the gangway. The county court judge, in the absence of direct evidence, drew the inference that the death arose out of the employment, and awarded compensation.

HELD—there was evidence to support the finding.

Notes.—*Per* Cozens-Hardy, M.R.: “The county court judge points out that the accident occurred in what has been called the ambit of his employment. His duties were not only on board the ship itself, but on that part of the jetty where he had to go to slacken or tighten as the case might be. It is not as though the accident happened outside the ambit of his employment.”

1961.—Hyndman v. Craig & Co. (1910), 45 I. L. T. 11; 4 B. W. C. C. 438—C. A. (Ir.).

A sailor returning on board his ship after a trip on shore unconnected with his employment fell into the water from steps leading from the gangway of which they formed part to the deck.

HELD—that this was not an accident arising out of the employment.

1962.—Biggart v. S.S. Minnesota (Owners) (1911), 5 B. W. C. C. 68—C. A.

A seaman went ashore with leave for his own purposes. When he returned late at night he found that the ship had been moved to another part of the dock; he proceeded to make his way to the ship, along the dockside, which had many railway lines upon it. He was injured by a train on the docks, about 200 yards from his ship.

HELD—the accident did not arise out of the employment.

Notes.—*Kitchenham v. S.S. Johannesburg (Owners)*, [1911] A. C. 417 [1930], followed.

1963.—Robertson v. Allan Brothers & Co. (1908), 77 L. J. K. B. 1072; 98 L. T. 821; 1 B. W. C. C. 172—C. A.

A ship's steward, being at liberty to do so, went on shore when the ship was unloading cargo and returned about 10 p.m. the same evening, being more or less under the influence of liquor. Instead of using the gangway as he ought to have done, he came on board by the cargo skid, in stepping from which he slipped and fell into the hold, and was fatally injured. According to the rules the crew were forbidden to come on board by the cargo skid, but they often did so, especially when they wished to escape observation.

HELD—that the accident arose out of and in the course of the steward's employment, notwithstanding that he was committing a breach of discipline in using the cargo skid instead of the gangway.

1964.—Canavan v. S.S. Universal (Owners) (1910), 3 B. W. C. C. 355—C. A.

A seaman had returned to his ship. He had passed over a gangway from the wharf, and had one foot on the rail of the ship and the other on a ladder leading from the rail to the deck, when he overbalanced and fell over the side of the ship and was drowned.

HELD—the accident arose out of and in the course of the workman's employment.

1965.—Moore v. Manchester Liners, [1910] A. C. 498; 79 L. J. K. B. 1175; 103 L. T. 226; 54 S. J. 703; 26 T. L. R. 618; 3 B. W. C. C. 527—H. L. (E.).

The appellant's husband, who was a fireman on the respondents' ship then lying in dock at South Brooklyn, New York, went on shore for the purpose of getting necessities, and, in returning with his companions, fell into the water from the loosely hanging ladder, which was the only means of access to the ship, and was drowned.

HELD (Lord Macnaghten and Lord Mersey *diss.*)—that the man died from an accident arising out of and in the course of his employment.

Decision of the Court of Appeal, [1909] 1 K. B. 417, reversed.

Notes.—In this case Lord Loreburn, L.C., considered that the case of *Robertson v. Allan Brothers* [1963] was directly in favour of the appellant, and said that he paid greater deference to the judgment in that case than to any of the *dicta* in the case of *McDonald v. S.S. Banana (Owners)* [1966], if they should appear to be irreconcilable with the judgment in the former case. *Low or Jackson's Case* [1959] discussed.

1966.—McDonald v. S.S. Banana (Owners), [1908] 2 K. B. 926; 78 L. J. K. B. 26; 99 L. T. 671; 24 T. L. R. 887; 52 S. J. 741; 1 B. W. C. C. 185—C. A.

A donkey-man employed on a steamship lying in a foreign port went on shore, and on his way back late at night met with a fatal

accident. On a claim for compensation under the Workmen's Compensation Act, 1906, it did not appear whether the deceased had gone ashore on ship's business or with or without leave. The only evidence given by the applicant as to the way in which the accident occurred was an extract from an entry in the ship's official log that the deceased, whilst returning on board ship from the shore, more or less the worse for liquor, refused the aid of the night watchman and policeman to assist him up the gangway, and, on reaching the top step, suddenly overbalanced and fell over the gangway main ropes, dropping between the ship and the quay, and striking an iron girder before reaching the water.

HELD—that it was for the applicant to prove affirmatively that the accident arose out of and in the course of the employment; that there was no presumption in favour of the applicant that the deceased was doing his duty until the contrary was proved; and that as the entry in the log left it that a conclusion perfectly consistent could be drawn, either that the man met his death by an accident arising out of his employment, or otherwise, the applicant failed.

Notes.—*Pomfret v. Lancashire and Yorkshire Railway*; [1903] 2 K. B. 718 [1932], followed. *Wakelin v. London and South Western Railway*, 12 App. Cas. 41; *Mitchell v. Glamorgan Coal Co.*, 22 T. L. R. 588, 589 [2084], referred to.

1967.—*Mitchell v. S.S. Saxon (Owners)* (1912), 5 B. W. C. C. 623; [1912] W. C. Rep. 363—C. A.

A sailor was seen at 8 p.m. about to leave his ship, which was at the quay side, to get provisions. Early the next morning he was found drowned in the dock, ten or fifteen feet from the gangway of the ship, and three feet from the quay side. His cap was found on the quay, and there was a fresh wind blowing. The county court judge found that the accident did not arise out of his employment.

HELD—that there was evidence to support the finding.

1968.—*Dixon v. S.S. Ambient (Owners)* (1912), 5 B. W. C. C. 429; [1912] W. C. Rep. 224—C. A.

A seaman, returning to his ship, was on a jetty hailing the ship for a boat. He had a parcel of food with him. He fell from the jetty and was drowned. There was no evidence whether he was on shore with leave or not. The county court judge found that he had not yet reached the ambit of his employment when the accident happened and awarded for the employers.

HELD—that there was evidence to support the finding.

1969.—*Frith v. S.S. Louisianian (Owners)*, [1912] 2 K. B. 155; 81 L. J. K. B. 701; 106 L. T. 667; 28 T. L. R. 331; 5 B. W. C. C. 410; [1912] W. C. Rep. 285—C. A.

A sailor went ashore without leave on the evening before his ship was due to sail from the port where she was lying. He remained ashore all night. The next morning, the ship's gangways having

been taken in, the mooring ropes cast off, and the vessel being still alongside, the sailor returned and was pushed on board in a helpless state of intoxication by two persons who helped him along the quay. He reached the deck on his hands and knees and lay there for a minute or two while the ship was gradually moving away from the quayside. He then attempted to get up, staggered backwards, fell overboard, and was drowned. Upon a claim for compensation under the Workmen's Compensation Act, 1906, the county court judge held that, the sailor having regained his ship, the accident arose out of and in the course of his employment, and he awarded compensation.

HELD—that the sailor had not regained his ship in a condition to perform his duties, that the accident was due solely to his intoxication and did not arise out of his employment.

Notes.—*Barnes v. Nunnery Colliery Co.*, [1912] A. C. 44 [2039], referred to.

1970.—*Griggs v. S.S. Gamecock (Owners)* (1913), 6 B. W. C. C. 14 ; [1913] W. C. & I. Rep. 122—C. A.

A seaman, while returning at 11 p.m. to his ship at the quay side, met with an accident, which resulted in death. Seamen had been expressly forbidden to sleep on board when in port, other accommodation having been found for them.

HELD—that the accident did not arise out of and in the course of the employment.

When important evidence given at the hearing is omitted from the county court judge's notes, this should be agreed between the parties rather than stated by affidavit.

Per Cozens-Hardy, M.R. : County court judges ought to state the basis of their judgment.

1971.—*Halvorsen v. Salvesen*, [1912] S. C. 99 ; 49 Sc. L. R. 27 ; 5 B. W. C. C. 519—Ct. of Sess.

A ship's engineer who was on shore for a legitimate purpose, in order to get back to his ship, then at anchor about 100 yards off the shore, got into a six-oared lifeboat, 27 feet in length, which he found lying at the jetty, and which in ordinary circumstances would have been manned by six men, each with an oar. It had in its rudder but no oars. He attempted to reach the ship by paddling with the rudder, trusting to the wind and tide, which were both in his favour, carrying him towards the ship. He was carried out to sea and was drowned.

HELD—that the accident did not arise out of and in the course of the deceased's employment.

Notes.—*Fletcher v. Owners of S.S. Duchess*, [1911] A. C. 671 [1958], followed. *Moore v. Manchester Liners*, [1910] A. C. 489 [1965] ; *Kitchenham's Case*, [1911] A. C. 417 [1930] ; *Leach's Case*, [1911] 1 K. B. 523 [1931], cited.

II. *Sphere of Employment.*(1) *Acting within Sphere of Employment.*

1972.—**Whitehead v. Reader**, [1901] 2 K. B. 48 ; 70 L. J. K. B. 546 ; 84 L. T. 514 ; 49 W. R. 562 ; 65 J. P. 403 ; 17 T. L. R. 387—C. A.

The question whether a servant who violates his master's order is or is not acting in the course of his employment depends on whether the order is or is not one limiting or defining the scope of the servant's employment.

A workman was employed as a carpenter. It was part of his duty to sharpen tools on a grindstone, but he had orders not to touch the machinery by which the grindstone was rotated. The band which rotated the grindstone slipped, and the man in trying to replace it was injured.

HELD—that the disobedience of the master's order did not of itself prevent the act of the workman from being an act done in the course of his employment.

Per A. L. Smith, M.R. (at 2 K. B. p. 49): "That the injury *primâ facie* arose out of and in the course of his employment is to me clear, but the man had been told not to touch the machinery, and it is said that this shows that the injury was not the result of an accident arising out of and in the course of his employment. Does disobedience to this order cause the man not to have been injured in the course of his employment? I think not. It cannot be said that every disobedience of an order terminates a man's employment." Lord Collins came to the same conclusion as the majority of the court, but with hesitation, and stated the law to be as follows: "It is not every breach of a master's orders that would have the effect of terminating the servant's employment so as to excuse the master from the consequences of the breach of his orders. We have to get back to the orders emanating from the master to see what is the sphere of employment of the workman, and it must be competent to the master to limit that sphere. If the servant acting within the sphere of his employment violates the order of his master, the latter is responsible. It is, however, obvious that a workman cannot travel out of the sphere of his employment without the order of his employer to do so; and if he does travel out of the sphere of his employment without such an order, his acts do not make the master liable either to the workman under the Workmen's Compensation Act, 1897, or to third persons at common law. . . . In the present case, if the two spheres of employment had been distinctly separated and defined—namely, the grinding of the tools and the skilled labour of managing the machinery—and the applicant's employment had been limited to the former, and if, while acting in breach of the order limiting his employment, he had met with the accident, the master would not have been liable."

Notes.—**Lowe v. Pearson**, [1899] 1 Q. B. 261 [1985], distinguished. **Beard v. London General Omnibus Co.**, [1900] 2 Q. B. 530, cited.

1973.—Conway v. Pumpherston Oil Co., Ltd., [1911] S. C. 660; 48 Sc. L. R. 632; 4 B. W. C. C. 392—Ct. of Sess.

C., a drawer employed in a coal mine, along with a companion, S., was working in a level from which they were driving an "upset." On the morning of the day of the accident the fireman discovered an outbreak of gas in the "upset," and accordingly placed a board across the entrance chalking upon it, "No road up here," such a board or fence being the usual mode of warning persons that it was dangerous to enter the place so fenced. Both C. and S. understood what the putting up of the board meant, and that it was dangerous to work in the "upset." C. and S. were working that morning at a different part of the mine. C. required a pick, and, knowing that S. had left one in the "upset," went to get it. S., who had been warned by the fireman earlier in the day not to go into the "upset" for the pick, but to get one from another place which he named, called out to C. that he was to go to this other place, but C. did not apparently hear what he said. C. entered the "upset," passing over or under the fence with a naked light in his cap. An explosion took place, and he was killed.

HELD—that as at the time of the accident C. was acting within the sphere of his employment, the accident was one arising out of and in the course of his employment within the meaning of the Workmen's Compensation Act, 1906.

Notes.—*Whitehead v. Reader* [1972] followed as showing that so long as a servant is not outside the sphere of his employment, mere disobedience to an order does not place him outside the sphere of his employment. *Reed v. Great Western Railway Co.*, [1909] A. C. 31 [2058], distinguished. *O'Brien v. Star Line*, [1908] S. C. 1258 [1933], referred to.

1974.—Harding v. Brynddu Colliery Co., Ltd., [1911] 2 K. B. 747; 80 L. J. K. B. 1052; 105 L. T. 55; 27 T. L. R. 500; 55 S. J. 599; 4 B. W. C. C. 269—C. A.

H., while employed as a collier by the defendants, was engaged with two other colliers in drilling a hole from above into a stall below to let out the gas in order to enable the stall to be worked. The entrance to this stall from below had been blocked with cross boards, to show that it was unsafe for any one to enter, and the men were by rules expressly forbidden to enter any working so blocked without special leave. H. and his mates had worked the drill some five feet into the ground without getting into the stall below, and he then asked a fireman and overlooker if he might go into the stall from below to ascertain whether the drill was being driven in the right direction. The fireman told H. he was not to go, as the stall was unsafe. Notwithstanding this, H. entered the stall from below; he was heard by his mates above tapping against the roof of the stall, and then all sounds ceased, and he was subsequently discovered in the stall suffocated by gas. On a claim for compensation by his dependants:

HELD (Buckley, L.J., *diss.*)—that, although H. had been guilty of wilful misconduct, his dependants were entitled to claim com-

pensation, as the act done by him, although wrongful, arose out of his employment.

Notes.—*Brice v. Edward Lloyd*, [1909] 2 K. B. 804 [2046], and *Weighill v. South Hetton Coal Co.*, [1911] 2 K. B. 757 [2001], distinguished. *Conway v. Pumpherson Oil Co., Ltd.* [1973] discussed and applied. The expression “sphere of employment” used by Lord Collins in *Whitehead v. Reader* [1972] criticised by Kennedy, L.J., as being “rather a dangerous metaphorical expression, in so far as it tends to introduce a suggestion of special importance, in regard to s. 1 of the Act, of the workman’s obedience to an order as to the local area of working.”

Buckley, L.J., in his dissentient judgment considered this case indistinguishable from *Weighill’s Case* [2001].

1975.—*Watkins v. Guest, Keen and Nettlefolds, Ltd.* (1912), 106 L. T. 818; 5 B. W. C. C. 307; [1912] W. C. Rep. 150—C. A.

A collier travelling to work by his employers’ train stepped out on to the footboard when the train was slowing up to stop, about sixty yards from the station. Riding on the footboard was expressly forbidden. The train was crowded. Other men stepping out, he moved a short way along the footboard to make room for them. He slipped and fell.

HELD (Buckley, L.J., *diss.*)—that the accident arose out of the employment.

Notes.—In this case Buckley, L.J., held to the same view as that expressed by him in *Harding v. Brynddu Colliery Co.* [1974], and *Astley v. Evans & Co.*, [1911] 1 K. B. 1036 [1939], in both of which cases he delivered a dissentient judgment, and was of opinion that the decisions in *Barnes v. Nunnery Colliery Co.*, [1912] A. C. 44 [2039], covered the present case. The majority of the court (Cozens-Hardy, M.R., Fletcher Moulton, L.J.) were of the opinion that this case came within the decisions in *Mawdsley v. West Leigh Colliery Co.* [1976]; *Harding v. Brynddu Colliery Co.*, *supra*; *Astley v. Evans & Co.*, *supra*. The difficulty is caused mainly by the circumstance that a workman is not in certain cases, of which this is one, deprived of his remedy, even though the accident in respect of which he is claiming compensation is attributable to his own serious and wilful misconduct (*per* Cozens-Hardy, M.R., 106 L. T., at p. 819). It must be remembered that the question whether the act was so outside the scope of the employment as to prevent the workman from being entitled to compensation is a question of fact (see the judgment of the Lord Chancellor in *Barnes v. Nunnery Colliery Co.* [2039]).

1976.—*Mawdsley v. West Leigh Colliery Co., Ltd.* (1911), 5 B. W. C. C. 80—C. A.

A workman was employed to oil machinery. He was strictly forbidden to oil it when in motion. He had been seen to do so, and warned against the practice. He did so again and received severe injuries from which he died.

HELD—the accident arose out of and in the course of the employment.

Notes.—*Harding v. Brynddu Colliery Co.* [1974] followed.

1977.—*Durham v. Brown Brothers & Co.* (1898), 1 F. 279.—Ct. of Sess.

An accident to a workman may be attributable to his adopting a wrong and dangerous method of doing work which could be done safely, and at the same time may be an “accident arising out of and in the course of the employment.”

1978.—*Gallant v. S.S. Gabir (Owners)*, [1913] W. C. & I. Rep. 116; 108 L. T. 50; 57 S. J. 225; 29 T. L. R. 198; 6 B. W. C. C. 9—C. A.

A seaman employed on board a fishing vessel was engaged in discharging fish from it across a gangway resting on a floating pontoon. While he was standing in the middle of the gangway it became necessary to lower the end of it that rested on the pontoon. Instead of walking off the gangway the seaman caught hold of the stem of another vessel which was moored alongside, and swung himself therefrom. While doing so he slipped and fell into the water, sustaining such serious injuries that he died.

HELD—that the accident arose “out of” as well as “in the course of” the seaman’s employment.

Notes.—Cozens-Hardy, M.R., adopted the following passage from the judgment of Lord Atkinson in *Barnes v. Nunnery Colliery*, [1912] A. C. 44 [2039]: “In these cases under the Workmen’s Compensation Act a distinction must, I think, always be drawn between doing a thing recklessly or negligently which the workman is employed to do and the doing of a thing altogether outside and unconnected with the employment. A peril which arises from the negligent or reckless manner in which an employee does the work which he is employed to do may well, and in most cases would rightly, be held to be a risk incidental to the employment.”

1979.—*Keyser v. Burdick & Co.* (1910), 4 B. W. C. C. 87—C. A.

The workman, a riveter on board ship in dock, was about to go ashore for his breakfast. When he came on deck he found the vessel was being removed to a dry dock, and already a short distance from the quay. The gangway had been removed, and there was no other means of getting ashore than by slipping down a rope which still held the vessel to the quay. By means of this rope a fellow workman got ashore safely and the applicant attempted to follow him. The rope gave way and he was thrown against the quay wall and injured.

HELD—there was evidence to support the finding of the county court judge that the accident “arose out of and in the course of the employment.”

1980.—Greer v. Lindsay Thompson, Ltd. (1912), 46 I. L. T. 89; 5 B. W. C. C. 586; [1912] W. C. Rep. 272—C. A. (Ir.).

A woman, part of whose work was to clean certain machinery in a factory, finding the guard removed from another part of the machinery which it was not her duty to touch, proceeded to clean that. While she was cleaning it the machinery started, and she was injured.

HELD—that the accident arose out of the employment.

Notes.—*Whitehead v. Reader* [1972] referred to.

1981.—Goslan v. Gillies, [1907] S. C. 68; 44 Sc. L. R. 71—Ct. of Sess.

A clerk employed at engineering works, whose duty it was to weigh and record all articles sent out from the works, met with an accident, which resulted in his death, while helping workmen to carry a heavy article to the weighing machine. It was found in fact that his duty in relation to articles sent out was “confined to weighing the articles, which it was the duty of other employes to carry to the weighing machine.”

HELD—that the accident arose out of and in the course of his employment, and that his widow was entitled to compensation.

Notes.—*Losh v. Evans & Co., Ltd.* [1986] distinguished. *Menzies v. M'Quibban*, 2 F. 732 [2012], referred to.

1982.—Henneberry v. Doyle (No. 2), [1912] 2 Ir. R. 529; 46 I. L. T. 70; 5 B. W. C. C. 580; [1912] W. C. Rep. 147.—C. A. (Ir.).

A workman was employed as a “barrow-man” by the consignee of a cargo in the unloading of a ship. Other men working at the unloading were employed by a ship-broker, among them being some “tippers.” The “barrow-man” changed places for a time with a “tipper,” and met with an accident while at his work. It was a practice of the men unloading ships at this port so to exchange work, and the practice was known to and not forbidden by the employers.

HELD—that the accident arose out of and in the course of the employment.

1983.—Harrison v. Whitaker (1899), 64 J. P. 54; 16 T. L. R. 108—C. A.

The applicant, a boy of fifteen, was employed to grease the wheels of railway trucks. At the time when the accident occurred out of which his claim arose he had finished greasing all the trucks that were ready, and while waiting for more he went to a fire that was close to a lever used for moving points. Seeing an engine coming, and thinking it was necessary that the points should be moved, he pulled the lever for the purpose of opening them; the engine came up and forced the points—which were automatic—open, and the handle of the lever, catching the applicant, threw him against the engine, severely injuring him. It was no part of the applicant's duty to touch the points, but he had not been ordered not to do so. Upon these

facts the county court judge found that the accident to the applicant "arose out of and in the course of his employment," and that he had not been guilty of "serious and wilful misconduct."

HELD—that there was evidence to support these findings.

1984.—Tobin v. Hearn, [1910] 2 Ir. R. 639; 44 I. L. T. 197—C. A. (Ir.).

A boy employed in the respondents' boot factory was engaged at his ordinary work upon a machine in the finishing room on the upper storey. By the factory regulations the hands were forbidden to change from one machine to another. An imperfectly moulded in-sole was brought up amongst others to the finishing room from the ground floor. An overseer directed the boy to bring the in-sole downstairs and have it re-moulded. The boy had not been expressly forbidden to touch the moulding machine. The operator in charge of this machine was temporarily absent, and the boy did not wait for his return, but attempted to re-mould the sole himself, and in doing so received injuries which resulted in the loss of three fingers. On an application for compensation the county court judge found that the accident did not arise out of and in the course of his employment.

HELD—that there was no evidence upon which the county court judge was justified in so finding; and that the boy was therefore entitled to compensation under the Workmen's Compensation Act, 1906.

Notes.—*Harrison v. Whitaker* [1983] followed.

(2) *Acting outside Sphere of Employment.*

1985.—Lowe v. Pearson, [1899] 1 Q. B. 261; 68 L. J. Q. B. 122; 79 L. T. 654; 47 W. R. 193; 15 T. L. R. 124—C. A.

If a person is employed in a factory to do purely unskilled labour, and is expressly forbidden to touch any of the machinery, and he meets with an accident in attempting, in violation of such orders, to clean a certain machine, such accident is not one "arising out of and in the course of the employment" within s. 1, sub-s. 1, of the Workmen's Compensation Act, 1897, so as to entitle him to compensation from his employer.

Notes.—In his judgment A. L. Smith, L.J., said: "It is not the case of a servant, while in his master's employ, doing upon an emergency something outside the scope of what he was employed to do in the interests of his master. I reserve the question what our decision in such a case ought to be till it arises. In this case the respondent was employed in the mere manual labour of making balls of clay, and handing them to the woman employed in working the machine. It was no part of his duty to touch the machinery, but on the contrary he was expressly ordered not to do so." Compare *Whitehead v. Reader* [1972].

1986.—Losh v. Evans & Co., Ltd. (1902), 51 W. R. 243; 19 T. L. R. 142—C. A.

The applicant was employed as a brow girl at the respondents' colliery pit, and her work at such was to pick out rubbish from the

coal as it was slowly moved along on a belt to the waggons. It was found as a fact by the county court judge that it was no part of the duty of the girls who did this work to start or stop the engine which worked the band, and that the applicant on the occasion in question was told by the other girls not to touch the engine. The man whose duty it was to start the engine being at the moment absent, the applicant started the engine herself, and her dress catching in the wheel, she was drawn in and seriously injured.

HELD (Mathew, L.J., *diss.*)—that as the county court judge had found as a fact that it was no part of the applicant's duty to stop or start the engine, and as there was evidence to justify such finding, the accident did not arise out of or in the course of her employment with the respondents.

Per Mathew, L.J.: that there was no evidence to support the finding that it was no part of the applicant's duty to touch the engine.

Notes.—*Lowe v. Pearson* [1985] followed.

1987.—*M'Allan v. Perthshire County Council* (1906), 8 F. 783; 43 Sc. L. R. 592—Ct. of Sess.

A roadman in the employment of a county road authority was injured when stepping down from a steam road roller belonging to the employers. The accident occurred before 7 a.m., the roadman's hour for beginning work. He had gone on to the roller for the purpose of breaking up the boiler fire so as to get up steam by 7 a.m. It was not part of his duty to do so, his employment being solely to sweep and put "blinding" on the road. He had privately arranged with the engineman to break up the fire so as to save the engineman and fireman, who had gone to their homes for the night, from returning before 7 a.m.

HELD—that the accident did not arise "out of and in the course of" the workman's employment.

Notes.—*Menzies v. M'Quibban* (1900), 2 F. 732 [2012], distinguished, since in the present case there was no emergency, no necessity for the man's intervention, and no interest of his employers to be served.

1988.—*Whelan v. Moore* (1909), 43 I. L. T. 205; 2 B. W. C. C. 114—C. A. (Ir.).

A man employed by the owner of a canal boat as driver, who was forbidden by his master to take part in the steering or management of the boat, was drowned whilst engaged in steering. A boatman, who had been temporarily in charge of the horse, had deserted a short time before the accident, and the other boatman, who was also the master, then decided to drive, ordering the deceased at the same time to steer.

HELD—that no emergency had arisen; that the deceased had, in taking part in the steering of the boat, violated the orders of his employer, and that therefore the accident did not arise out of and in the course of the employment.

1989.—*Jenkinson v. Harrison, Ainslie & Co., Ltd.* (1911), 4 B. W. C. C. 194—C. A.

A workman in a power house dusted the switchboard. It was no part of his duty and he was expressly forbidden to do so. In doing this he fell against the live gear, and sustained injuries.

HELD—that the accident did not arise out of the employment.

1990.—*Marriott v. Brett and Beney, Ltd.* (1911), 5 B. W. C. C. 145—C. A.

A baker in a steam bakery required to have an engine started in order to mix the dough he had prepared. The man in charge of the engine being absent, he started the engine himself. He had often done so before, and had been forbidden to do so. The machinery caught him up and killed him. The county court judge found that he was not employed to touch the engine at all, and that the accident did not arise out of the employment.

HELD—there was evidence to support the finding.

1991.—*Naylor v. Musgrave Spinning Co., Ltd.* (1911), 4 B. W. C. C. 286—C. A.

A boy, employed to piece broken ends of yarn in a spinning mill, injured himself while cleaning machinery in motion. The judge found as a fact that he was not employed to clean the machinery.

HELD—that the accident did not arise out of the employment.

1992.—*Davies v. Crown Perfumery Co.* (1913), 6 B. W. C. C. 649 ; [1913] W. C. & I. Rep. 484—C. A.

A lad, a soap-stamper, was supposed to make himself "handy about the place" after he had finished stamping soap. He went to help a fellow workman remove a piece of soap which had become jammed in a soap compressing machine, with result that his hand and arm were caught and injured in the revolving knives of the machine. He said that he had been ordered to go to the machine, but this was denied by the employers.

The county court judge disbelieved the boy, and found that he had no right to touch the machines, and consequently found that the accident did not arise out of and in the course of the employment.

HELD—there was evidence to support the finding.

1993.—*McDiarmid v. Ogilvy Brothers* (1913), 50 Sc. L. R. 883 ; [1913] W. C. & I. Rep. 537—Ct. of Sess.

A. was employed to work at a mangle, his duties being to bring the cloth to the machine and to help in putting it on and in taking it off the roller. It was no part of his duty to be inside the rails in front of the mangle or to interfere with the machine while the cloth was in it. On certain days and at certain fixed times A. had to assist B., the headman, in cleaning the machinery when it was stopped for the purpose. Cleaning the machinery when in motion

was strictly prohibited, and a notice to that effect was placed opposite the mangle. On a day which was not one of the cleaning days, and when B. was out of sight, A. placed himself within the rails and attempted to clean the mangle, and was injured.

HELD—that the accident did not arise out of and in the course of his employment.

Notes.—*Smith v. Fife Coal Co.* [2004] applied. *Mawdsley v. West Leigh Colliery Co.* [1976] distinguished. *Conway v. Pumpherson Oil Co.* [1973]; *Kerr v. William Baird & Co.* [2002]; and *Barnes v. Nunnery Colliery Co.* [2039], referred to.

1994.—*McCabe v. Henry North and Sons, Ltd.* (1913), 6 B. W. C. C. 504; [1913] W. C. & I. Rep. 513—C. A.

A boy was employed as a “box-minder” in woollen mills, and knew it was his duty, if the machine feeding the box was not working properly, to report the matter to the foreman, and not to touch it himself. A warp having slackened in passing over rollers, he endeavoured to tighten it himself, with the result that his fingers were caught and crushed in the rollers.

HELD—that the accident did not arise out of the employment.

1995.—*Whiteman v. Clifden (Viscount)*, [1913] W. C. & I. Rep. 126; 6 B. W. C. C. 49—C. A.

An assistant porter, whose duties were to act under the directions of the head porter of a hospital, was ordered to clean certain lights and windows on the top floor. He went up in the lift, and noticing some dust on the top edge of the lift as it was going up, he placed his steps against the lift, and got up to remove it. His head was thereby placed outside the top of the lift and was crushed against a beam when it reached the top of the building. There was no evidence that he had any orders to dust the lift.

HELD—that as the risk he undertook by placing his head outside the lift was not within the scope of his employment, the injury was not caused by an accident arising “out of” his employment within s. 1, sub-s. 1, of the Workmen’s Compensation Act, 1906, and that he was therefore not entitled to compensation.

1996.—*Cronin v. Silver* (1911), 4 B. W. C. C. 221—C. A.

A girl, employed solely to work one machine, scratched her hand on a machine of another sort. It was not explained how she came to be at the other machine. Blood poisoning followed, and she died.

HELD—the county court judge was not justified in inferring that the accident arose out of the employment.

1997.—*Edwards v. International Coal Co.* (1899), *Times*, November 13th; 5 W. C. C. 21—C. A.

An accident occurring to a labourer in a mine while he is, without

instructions, acting as a collier is not one arising out of and in the course of his employment.

1998.—Smith v. South Normanton Colliery Co., [1903] 1 K. B. 204 ; 72 L. J. K. B. 76 ; 88 L. T. 5 ; 51 W. R. 209 ; 67 J. P. 381 ; 19 T. L. R. 128—C. A.

The applicant, who was employed as a gang boy in a pit, was suspended from work, and ordered by the deputy manager to go to the pit-bottom, where it was the usual practice for disputes to be settled by the under manager. This order to go to the pit-bottom was given about 1.30 p.m. The applicant disobeyed the order and remained in a "pass-by" in the workings till 3.40 p.m., when a part of the roof fell and injured him. It was against the rules for workmen to remain in the workings when not at work, but it was admitted that in the ordinary course the applicant could not have been taken up the shaft till four o'clock. The county court judge found that, although the applicant had not been guilty of serious and wilful misconduct, he was not entitled to compensation, as the accident, having happened two hours after he had been suspended from work and in a place where he had no right to be, did not arise out of and in the course of his employment.

HELD—that there was evidence upon which the county court judge could so find.

1999.—Tomlinson v. Garratts, Ltd. (1913), 6 B. W. C. C. 489 ; [1913] W. C. & I. Rep. 416—C. A.

A collier went to get coal at a stall, where he had been expressly told by the foreman not to go, and was there killed by a fall of coal.

HELD—that the accident did not arise out of and in the course of the employment.

Per Cozens-Hardy, M.R. : It is the bounden duty of a county court judge to take a sufficient note in workmen's compensation cases.

2000.—Parker v. Hambrook, [1912] W. N. 205 ; 107 L. T. 249 ; 56 S. J. 750 ; 5 B. W. C. C. 608 ; [1912] W. C. Rep. 369—C. A.

A workman was employed to dig flints in a quarry where there was a trench into which he was forbidden to go. An accident caused his death while working in the trench.

HELD—that the accident did not arise out of his employment.

Notes.—*Weighill v. South Hetton Coal Co., Ltd.* [2001] followed. *Harding v. Brynddu Colliery Co., Ltd.,* [1911] 2 K. B. 747 [1974], distinguished, on the ground that in that case the workman was doing what he was instructed to do, and doing it for the purpose of advancing the job he had been told to do, but doing it in a particular mode in which he had been told not to do it.

2001.—Weighill v. South Hetton Coal Co., Ltd., [1911] 2 K. B. 757, n.; 4 B. W. C. C. 141—C. A.

Per Cozens-Hardy, M.R.: “The learned judge in his judgment says this: ‘The question of law is whether this man being authorised to hew at the face of the coal where it was hard and having gone to the wall side to hew where it was soft, his relatives are outside the Act. It is said he was never employed to hew coal there at all and that to get coal there was improper, but in my opinion it was “within the scope of his employment.”’

“The learned judge states the proposition of law, and I accept that as an accurate statement.”

Notes.—Fletcher Moulton, L.J., expressed his agreement with the judgment of the Master of the Rolls, but Buckley, L.J., was of opinion that the man's employment did not include the hewing of coal where he was killed.

2002.—Kerr v. William Baird & Co., Ltd., [1911] S. C. 701; 48 Sc. L. R. 646; 4 B. W. C. C. 397—Ct. of Sess.

The rules of a pit, worked in terms of the Explosives in Coal Mines Order of February 21st, 1910, provided that explosives capable only of being fired by detonators should be used: that the detonators should be securely kept and issued only to shot-firers; and that every charge should be fired by a competent person appointed in writing to perform the duty. On the occasion in question, after the shot-firer had left the pit, a miner who had a detonator in his possession—which, however, he had not received from the shot-firer—started to fire a shot. In the course of the operation an explosion occurred whereby he was killed.

HELD—that the accident happened while the miner was taking upon himself a duty which he was neither engaged nor entitled to perform, and that it did not arise out of and in the course of the deceased's employment.

Notes.—*Conway v. Pumpherston Oil Co.,* [1911] S. C. 660 [1973], referred to.

2003.—Burns v. Summerlee Iron Co., [1913] S. C. 227; 50 Sc. L. R. 164; (1912) 2 S. L. T. 469; 6 B. W. C. C. 320; [1913] W. C. & I. Rep. 45—Ct. of Sess.

A repairer was engaged in making repairs on an air course in a mine, and it was necessary for him to bring wood to that place for the purpose. This could be done by hauling the wood up the air course, or by taking it up in hutches by a wheel brae, and the repairer was directed to take it up by the air course and not by the wheel brae. The wheel brae was worked by gravity, an empty hutch or a hutch loaded with wood being pulled up by a descending hutch loaded with coal. At the foot of the wheel brae was posted a “hanger on” to whose sole charge was entrusted the duty of attaching hutches there and of giving the necessary signals to the man at the top, who then set the hutches on the wheel brae in motion. The

hanger on had attached an empty hutch and had given the appropriate signal to the man at the top, and then temporarily left the foot of the brae to wheel out a full hutch. In his absence the repairer loaded the empty hutch in an unskilful manner with wood, and the man at the top, having already received the necessary signal, attached a full hutch and started the wheel. The chain broke, and the repairer was struck by the descending full hutch and killed.

HELD—that the repairer was killed while arrogating to himself a duty which he was neither engaged nor entitled to perform, and accordingly that the accident did not arise out of his employment.

Notes.—*Kerr v. William Baird & Co.* [2002] followed. *Conway v. Pumpherston Oil Co.* [1973] distinguished.

2004.—*Smith v. Fife Coal Co.*, [1913] S. C. 662 ; 50 Sc. L. R. 455 ; 6 B. W. C. C. 435 ; [1913] W. C. & I. Rep. 343—Ct. of Sess.

The use of explosives in a mine was regulated by statutory rules which provided that every charge should be fired by a specially appointed shot-firer, and that when the firing was done by electricity it was the duty of the shot-firer himself to connect the charge with the cable and thereafter to connect the cable with the firing apparatus, after seeing that all persons in the vicinity had taken shelter. A duly appointed shot-firer was in the habit of getting the miners to connect the charges with the cable, and on one occasion he handed the cable to a miner for the purpose of having it so connected, and, without waiting till this had been done and without ascertaining that all persons in the vicinity had taken shelter, coupled the cable to the firing apparatus. He then fired the shot, and the miner, who had attached the cable to the charge and had not had time to retire to a place of safety, was seriously and permanently disabled by the explosion.

HELD—that the accident to the miner would not have happened but for his undertaking a duty which he was neither engaged nor entitled to perform, and accordingly that it did not arise out of and in the course of his employment.

Notes.—In his judgment Lord Dundas said : “ If the workman, acting within the sphere of his employment violates an order, the master may be liable in compensation ; but if he arrogates to himself the functions of some other servant whose duties are different from his own (*e.g.*, *Kerr v. William Baird & Co.* [2002]), or travels into some territory with which he has nothing to do (*e.g.*, *O'Brien v. Star Line, Ltd.* [1933]), the result is otherwise. One must in each case consider whether, when the accident occurred, the injured man was ‘ doing what a man so employed may reasonably do within a time during which he is employed, and at a place where he may reasonably be during that time to do that thing ’ (*per* Lord Loreburn, L.C., in *Moore v. Manchester Liners* [1965]).” *Whitehead v. Reader* [1972] ; *Conway v. Pumpherston Oil Co.* [1973] ; *Barnes v. Nunnerly Colliery Co.* [2039] ; *M'Allan v. Perthshire County Council* [1987], and other cases referred to.

2005.—Curtis v. Talbot and Kidderminster Infirmary (1911), 5 B. W. C. C. 41—C. A.

An infirmary received a present of X-ray apparatus. Nobody knew the time for necessary exposure for treatment of ringworm, but a house surgeon volunteered to have an experimental exposure on his own arm. The result of this was a serious burn.

HELD—that the accident did not arise out of the employment.

2006.—Smith v. Morrison (1911), 5 B. W. C. C. 161—C. A.

A workman employed as a potman, whose duty it was, amongst other things, to run messages, was sent by his employer expressly to Hatton Garden for a postal order. He failed to get one there and went on to the General Post Office, some half a mile further. Here he slipped on a banana skin and injured himself. The county court judge held that this was not an accident arising out of and in the course of his employment.

HELD—that there was evidence to support this finding.

2007.—Geary v. Ginzler, [1913] W. C. & I. Rep. 314; 108 L. T. 286; 6 B. W. C. C. 72—C. A.

Obedience to the directions of a superior fellow workman may so enlarge the scope of employment of a workman that an accident resulting from an act done in accordance with those directions although in contravention of the express regulations of the employer, may entitle the workman to compensation under the Workmen's Compensation Act, 1906, inasmuch as to impose upon a workman the duty of ascertaining the authority of a superior fellow workman to give such directions would be to lay upon him an obligation which in many cases it would be impossible for him to discharge.

2008.—Brown v. Scott (1899), 1 W. C. C. 11; *Times*, June 12th, 1899—C. A.

A boy of thirteen years of age, whose duty was to do all kinds of things under the direction of a foreman, was told by another man that the foreman had said he was to do certain work. The boy commenced to do the work and was injured.

HELD—that the accident arose out of and in the course of his employment.

(3) *Emergency.*

2009.—Rees v. Thomas, [1899] 1 Q. B. 1015; 68 L. J. Q. B. 539; 80 L. T. 578; 47 W. R. 504; 15 T. L. R. 301—C. A.

The Workmen's Compensation Act, 1897, applies to the case of a workman engaged in an employment within that statute, who, on an emergency, does in his master's interest an act outside the scope of that employment, and is injured by an accident arising out of and in the course of so doing.

A fireman in a coal pit employed to report to the colliery office on the state of the mine was riding, in breach of his orders, upon a tram laden with ashes and drawn by a horse in the direction of the office. The horse bolted, and the man ran to check it, in attempting which he fell and was run over by the tram.

HELD—that he was injured by an accident arising out of and in the course of his employment within s. 1, sub-s. 1, of the Workmen's Compensation Act, 1897.

Notes.—The judgment of A. L. Smith, L.J., in *Lowe v. Pearson*, [1899] 1 Q. B., at p. 263 [1985], referred to, and the present case distinguished from that case.

2010.—*Devine v. Caledonian Railway Co.* (1899), 1 F. 1105—Ct. of Sess.

A carter was waiting with his cart and horse at a goods station, when the horse "from some unexplained cause" started off, and the carter in endeavouring to stop it received injuries from which he died.

HELD—that the accident arose out of and in the course of his employment.

2011.—*London and Edinburgh Shipping Co. v. Brown* (1905), 7 F. 488; 42 Sc. L. R. 357—Ct. of Sess.

A steamship was moored to a quay in a dock discharging her cargo under a stevedore who had contracted with her owners to unload her. The labourers in the employment of the stevedore were each appointed to work in connection with a particular hold of the vessel, either on board her or on the quay. One of the labourers who was employed on the quay to discharge cargo from the after-hold, and who did not require, in the performance of his duty, to go on board the vessel, on being informed that one of his fellow-workmen employed in the fore-hold was lying there in an unconscious condition owing to inhaling noxious gas, offered to attempt a rescue, and after a handkerchief had been tied round his mouth he was lowered into the fore-hold, where both he and the man he had attempted to rescue were suffocated by carbonic acid gas. In doing what he did the workman acted without instructions from his employer—the stevedore—who had gone for rescue appliances.

HELD (Lord Kyllachy *diss.*)—that the workman met his death by an accident arising out of and in the course of his employment.

Notes.—*M'Govern v. Cooper & Co.*, 4 F. 249 [2330], distinguished. (This case should be contrasted with the case of *Mullen v. Stewart*, [1908] S. C. 991 [2081].)

2012.—*Menzies v. M'Quibban* (1900), 2 F. 732; 37 Sc. L. R. 526—Ct. of Sess.

A labourer employed in a steam joinery shop, whose duties were not connected with the management of the machinery, met with a fatal accident while assisting a machineman to replace some loose

belting upon the machinery while in motion. It was found in fact that the foreman might have ordered the deceased to assist in replacing the belting, but no such order had been given.

HELD—that the accident arose out of and in the course of the labourer's employment within s. 1, sub-s. 1, of the Workmen's Compensation Act, 1897.

Notes.—*Rees v. Thomas* [2009] and *Low v. Pearson* [1985] referred to and distinguished from each other.

III. *Risks Incidental and not Incidental to Employment.*

(1) *Risks Incidental to Employment.*

(a) TORTIOUS ACTS OF A THIRD PARTY.

N.B.—See also cases sub-tit. "Accident occasioned by Assault or Murder," p. 833.

2013.—*Challis v. London and South Western Railway*, [1905] 2 K. B. 154; 74 L. J. K. B. 569; 93 L. T. 380; 53 W. R. 613; 21 T. L. R. 486—C. A.

An engine-driver while driving an engine was injured by a stone thrown wilfully by a boy from a bridge under which the railway passed.

HELD—that the injury was due to an accident arising out of and in the course of the engine-driver's employment, inasmuch as the risk of being struck by stones thrown at trains is one to which engine-drivers are specially exposed.

Notes.—*Armitage v. Lancashire and Yorkshire Railway* [2015], and *Falconer v. London and Glasgow Engineering and Iron Ship-building Co.*, 3 F. 564 [2076], considered.

2014.—*Kelly v. Board of Management Trim Joint District School* (1913), 47 Ir. L. T. 151; 6 B. W. C. C. 921; [1913] W. C. & I. Rep. 401.—C. A. (Ir.). Affirmed 136, L. T. J. 605—H. L.

An assistant schoolmaster in an industrial school, owing to his efforts to maintain discipline, incurred the enmity of some of the boys, who assaulted him in pursuance of a prearranged plan. He died as a result of the injuries he received.

HELD—death was due to an accident arising out of the employment.

Notes.—Affirmed by H. L.—see 136 L. T. J. 605, and *Times* Newsp., April 7th, 1914. *Nisbet v. Rayne* [1888] and *Anderson v. Balfour* [1889] followed.

2015.—*Armitage v. Lancashire and Yorkshire Railway*, [1902] 2 K. B. 178; 71 L. J. K. B. 778; 86 L. T. 883; 66 J. P. 613; 18 T. L. R. 648—C. A.

One of a large number of boys employed in the coach-painting department of the works of a railway company, while engaged in his

work, received an injury by a blow from a piece of iron thrown in anger by one of two other boys in the same employment at the other, neither of them being at the time engaged upon his work.

HELD—that the accident causing the injury did not arise out of the employment of the injured boy within the meaning of s. 1, sub-s. 1, of the Workmen's Compensation Act, 1897.

Notes.—*Falconer v. London and Glasgow Engineering and Iron Shipbuilding Co.*, 3 F. 564 [2076], followed.

2016.—*Collins v. Collins*, [1907] 2 Ir. R. 104; 41 Ir. L. T. 3—C. A.

A. was in the employment of B., a contractor, as foreman of sewage works. Certain pipes which had been laid in the street in the course of the work were wantonly broken. B. directed A. to protect the pipes, and while A. was so engaged further damage was done, for which A., under B.'s direction, demanded payment from the wrongdoers. This led to an altercation, in the course of which B. was struck and fell, and A., on going to his rescue, was stabbed, and died.

HELD—that A.'s death was not caused by an accident arising out of and in the course of his employment, within the meaning of s. 1 of the Workmen's Compensation Act, 1897.

Notes.—*Challis v. London and South Western Railway* [2013] and *Armitage v. Lancashire and Yorkshire Railway* [2015], discussed.

2017.—*Murphy v. Berwick* (1909), 43 Ir. L. T. 126; 2 B. W. C. C. 103—C. A. (Ir.).

Where the applicant was employed as cook at an hotel in which the kitchen and the bar were on the same level, and a customer came out of the bar into the kitchen, where he had no business to be, and made a rush at the cook, who, in trying to avoid him, put her arm through a glass door and was seriously injured :

HELD—that this was not an accident arising "out of" the employment.

Notes.—*Collins v. Collins* [2016] applied.

2018.—*Mitchinson v. Day*, [1913] 1 K. B. 603; 82 L. J. K. B. 421; [1913] W. C. & I. Rep. 324; 108 L. T. 193; 57 S. J. 300; 29 T. L. R. 267; 6 B. W. C. C. 190—C. A.

While a carter was in charge of his employers' horse and van in a street a drunken man approached and struck the horse. The carter warned the man that the horse might hurt him, and the man thereupon assaulted the carter and struck him a blow on the head from which he died. On a claim for compensation by the widow of the carter :

HELD—that, assuming the occurrence to have been an "accident," it did not arise "out of" the employment, the risk of being assaulted by a drunken man not being in any way specially connected with or incidental to the employment of a carter; and that the widow was

therefore not entitled to compensation under the Workmen's Compensation Act, 1906.

Notes.—*Per* Cozens-Hardy, M.R. : “ Two points have been taken by the employers on this appeal—first, that there was no accident within the meaning of the statute, the act done by Parkes being wilful and felonious. I do not think that in this court that argument can prevail. We have held in several cases, and particularly in *Nisbet v. Rayne* [1888], that there may be an accident although it was due to an intentional act on the part of the felon. In Ireland the same view has prevailed, but in Scotland a different view has been taken. The point can, in my opinion, be raised only in the House of Lords. Secondly, assuming that there was an accident, it did not arise out of the employment. The risk of being assaulted by a drunken man was not in any way specially connected with, or incident to, the employment of a carter, and therefore the decision in . . . *Warner v. Couchman* [2024] applies.”

Per Buckley, L.J. : “ To satisfy the words of the Act the occurrence must be one in which there is personal injury by something arising in a manner unexpected and unforeseen from a risk reasonably incidental to the employment. Nothing can come ‘out of the employment’ which has not in some reasonable sense its origin, its source, its *causa causans* in the employment.”

Armitage v. Lancashire and Yorkshire Railway [2015]; *Blake v. Head* [1891]; *Fitzgerald v. Clarke* [1929]; *Craske v. Wigan* [2030], and other cases referred to.

2019.—*Shaw v. Wigan Coal and Iron Co., Ltd.* (1909), 3 B. W. C. C. 81—C. A.

A workman for no apparent reason deliberately assaulted a fellow workman, who, in preventing himself from falling over a moving rope, swung up his hand which was holding a hammer, and injured the other workman's eye.

HELD—that the accident did not arise out of and in the course of the workman's employment.

2020.—*Manson v. Forth and Clyde Steamship Co.,* [1913] S. C. 921; 50 Sc. L. R. 687; [1913] W. C. & I. Rep. 399—Ct. of Sess.

A ship's carpenter, working on the poop of a vessel lying in harbour, was severely burnt owing to some shavings by which he was surrounded being ignited by a match carelessly thrown down by a shore labourer. The carpenter's trousers happened to be saturated with inflammable oil which had leaked from a barrel he had shifted in the course of his work, and thus readily caught fire from the shavings.

HELD—that he was injured by an accident arising out of and in the course of his employment.

Notes.—*Per* the Lord President “ I think that was a risk to which he was exposed to a greater extent than other people because of his employment. Other people were not exposed to the risks of that

fire, because they had not to work on the poop among these shavings and to work in oily trousers. He was bound to work under those conditions."

(b) INJURY BY WEATHER, LIGHTNING, SUNSTROKE, FROST, ETC.

2021.—**Andrew v. Failsworth Industrial Society**, [1904] 2 K. B. 32 ; 73 L. J. K. B. 510 ; 90 L. T. 611 ; 52 W. R. 451 ; 68 J. P. 409 ; 20 T. L. R. 429—C. A.

A workman who was employed upon a building exceeding thirty feet in height, which was being constructed by his employers by means of a scaffolding, was struck by lightning and killed when he was working on the scaffold about twenty-three feet above the level of the ground. The county court judge held, having heard evidence upon the point, that the workman was under the circumstances exposed to a substantial and abnormally increased risk owing to the position in which he had to work, and awarded compensation to his widow under s. 1, sub-s. 1, of the Workmen's Compensation Act, 1897.

HELD—that there was evidence to justify the county court judge in coming to the conclusion that the workman was killed by an accident arising "out of," as well as "in the course of," his employment.

Notes.—The question in this case was whether the accident arose "out of" the employment, since no doubt arose as to its being "in the course of the employment." The main ground of the decision in this case was that the man was in fact exposed to more than normal risk of being struck. See the judgment of Collins, M.R. : "We know that lightning is erratic, and possibly no position or circumstance can afford absolute safety. But, if there is under particular circumstances in a particular vocation something appreciably and substantially beyond the ordinary normal risk, which ordinary people run, and which is a necessary concomitant of the occupation the man is engaged in, then I am entitled to say that the extra danger to which the man is exposed is something arising out of his employment." *Falconer v. London and Glasgow Engineering and Iron Shipbuilding Co.*, 3 F. 564 [2076], cited. The case of *Kelly v. Kerry Council* [2023] should be compared with the above case.

2022.—**George Anderson & Co. (1905) Ltd. v. Adamson (1913)**, 50 Sc. L. R. 855 ; [1913] W. C. & I. Rep. 506—Ct. of Sess.

A workman who during a violent gale was engaged in erecting a stone planing machine in an open yard, was struck and injured by a slate blown off the roof of an adjoining wood store. Owing to a stooping position, rendered necessary by his work, in which the workman was at the time of the accident, he did not see the slate coming and was thereby prevented from avoiding it.

HELD—that there was evidence on which the sheriff-substitute was entitled to find that the accident to the workman arose out of his employment.

Notes.—*Per* Lord Johnston : "This case is one of the class where

a workman is injured by accident arising out of a course or state of circumstances to which all persons are more or less exposed, such as street traffic, severe weather, etc. In these cases the risk is a common or normal risk, and the question, broadly put, is whether the workman's exposure to it was abnormal or excessive by reason of his employment. If it is the normal risk merely which causes the accident, the answer must be that the accident did not arise out of the employment. But if the position which the workman must necessarily occupy in connection with his work results in excessive exposure to the common risk (compare *Ismay, Imrie & Co. v. Williamson* [1852]; *Rodger v. Paisley School Board* [2038]), or if the continuity or exceptional amount of exposure aggravates the common risk (compare *M'Neice v. Singer Sewing Machine Co.* [2034]; *Warner v. Couchman* [2024]), then it is open to conclude that the accident did not arise out of the common risk but out of the employment." *Andrew v. Failsworth Industrial Society* [2021] and *Blakey v. Robson, Eckford & Co., Ltd.*, [2028] also referred to.

2023.—*Kelly v. Kerry County Council* (1908), 42 Ir. L. T. 23; 1 B. W. C. C. 194—C. A. (Ir.).

A workman engaged on the road during a storm, whose duty was to clean out the gullies to prevent the water flooding the road, was struck dead by lightning. In a claim brought under the Act of 1906 by the widow:

HELD (supporting the decision of the county court judge of Kerry)—that death was not occasioned by accident arising out of the employment.

Notes.—*Andrew v. Failsworth Industrial Society* [2021] distinguished.

2024.—*Warner v. Couchman*, [1911] 1 K. B. 351; 80 L. J. K. B. 526; 103 L. T. 693; 4 B. W. C. C. 32; 55 S. J. 107; 27 T. L. R. 121—C. A.

A journeyman baker, whose arm was injured by frost-bite while on his rounds with his employer's car, was:

HELD (by the Court of Appeal, Fletcher Moulton, L.J., *diss.*)—not to be entitled to compensation under the Workmen's Compensation Act, 1906, as the accident did not arise out of his employment.

HELD (by the House of Lords, affirming the Court of Appeal, [1912] A. C. 35; 81 L. J. K. B. 45; 105 L. T. 676; 28 T. L. R. 58; 56 S. J. 70; 5 B. W. C. C. 177; 49 Sc. L. R. 681—H. L.)—that there was nothing in the evidence to disentitle the county court judge from finding as he did, that the appellant was not by reason of his employment specially affected by the severity of the weather and therefore had not suffered injury by accident arising out of his employment.

Notes.—In the judgments in the Court of Appeal the following cases were referred to by the Master of the Rolls: *Craske v. Wigan* [2030]; *Andrew v. Failsworth Industrial Society* [2021]; *Kelly v. Kerry County Council* [2023]. Lord Justice Fletcher Moulton, in

his dissenting judgment, distinguished this case from that of *Eke v. Hart-Dyke*, [1910] 2 K. B. 677 [1861], on the ground that the present case bore no similarity to an industrial disease, and followed the decision in *Morgan v. Owners of S.S. Zenaida*, 25 T. L. R. 446 [1853], on the ground that he could see no distinction between the effects of heat and cold in a matter of this kind, provided that the excess of exposure is due to the circumstances of the employment. His Lordship also adopted the *dictum* of Lord McLaren in *Stewart v. Wilsons and Clyde Coal Co.*, 5 F. 120 [1840], which was as follows: "If a workman in the reasonable performance of his duties sustains a physiological injury as the result of the work he is engaged in, this is an accidental injury in the sense of the statute."

2025.—*Karemaker v. S.S. Corsican (Owners)* (1911), 4 B. W. C. C. 295—C. A.

A seaman at work on his ship at Halifax, N.S., sustained frost-bite. The county court judge found that the workman had not proved that the frost-bite was due to any particular circumstance of the employment, nor that he had been exposed to more risk of frost-bite than is usual in winter at Halifax.

HELD—that the accident did not arise out of the employment.

Notes.—*Warner v. Couchman* [2024] followed.

2026.—*Davies v. Gillespie* (1911), 105 L. T. 494; 28 T. L. R. 6; 56 S. J. 11; 5 B. W. C. C. 64—C. A.

While a ship on which the applicant was an officer was in a West Indian port, loading cargo, the applicant was on May 31st, 1910, posted on a portion of the steel deck, which was unprotected by an awning, and he had to lean over a hatchway from 6 a.m. to 11 a.m. to superintend the work. At 11 a.m. he was taken ill with sunstroke, which resulted in injury to his eyes. In a claim for compensation under the Workmen's Compensation Act, 1906, the county court judge made an award in favour of the applicant on the ground that he had been subjected to an abnormal risk in the course of his employment.

HELD—that there were facts on which the county court judge could come to that conclusion.

Notes.—The only question raised in the present case was "whether the applicant was by reason of his employment exposed to a greater risk of sunstroke than other persons" (*per* Cozens-Hardy, M.R., 105 L. T., at p. 495). *Warner v. Couchman* [2024] distinguished.

The Master of the Rolls pointed out that in his opinion "this court ought to be very careful to refrain from saying anything which might be taken to mean that anyone who by reason of his occupation is exposed to the roughness of the weather is entitled to compensation for the injury thus incurred." *Morgan v. S.S. Zenaida*, 25 T. L. R. 446 [1853]; *Andrew v. Failsworth Industrial Society* [2021]; *Karemaker v. S.S. Corsican* [2025]; *Kelly v. Kerry County Council* [2023] referred to.

2027.—Wilkes (or Wicks) v. Dowell & Co., [1905] 2 K. B. 225; 74 L. J. K. B. 572; 92 L. T. 677; 53 W. R. 515; 21 T. L. R. 487—C. A.

A workman was employed on a wharf and was engaged in the discharge of coal from the hold of a ship. His duty was to stand on a staging close to the open hold, direct the course up and down of a bucket in which the coal was being discharged, and give the necessary signals to the crane-man. While so engaged he was suddenly seized with an epileptic fit, and the result was that he fell into the hold and was seriously injured. It appeared that on previous occasions he had been subject to fits.

HELD—that the workman's injuries were caused by an accident which arose "out of" as well as "in the course of" his employment, and that he was entitled to compensation.

Notes.—*Fenton v. Thorley*, [1903] A. C. 443 [1839], referred to.

2028.—Blakey v. Robson, Eckford & Co., Ltd., [1912] S. C. 334; 49 Sc. L. R. 254; 5 B. W. C. C. 536; [1912] W. C. Rep. 86—Ct. of Sess.

A plumber, who was in a state of impaired vitality at the time, was engaged on an excessively hot day in July in laying and jointing pipes in a trench cut in a road. His work obliged him to stoop to a considerable extent, and while so engaged he was struck down by heat apoplexy, from the effects of which he subsequently died.

HELD—that even assuming there was an "accident," it did not arise "out of" the workman's employment, as there was no special danger to which he had been exposed by the nature of the employment beyond that to which other persons who were engaged in similar employment were exposed.

Notes.—*Ismay, Imrie & Co. v. Williamson*, [1908] A. C. 437 [1852]; *Morgan v. S.S. Zenaida*, 25 T. L. R. 446 [1853], distinguished. With regard to the latter case the Lord President in his judgment said: "I am bound to say, if I agree with that case at all, it is only upon the ground that the peculiar position in which he was placed put him, so to speak, under a burning glass and exposed him to a greater heat from the necessities of his occupation than other people were exposed to."

See also *Rodger v. Paisley School Board* [2038].

2029.—Kinghorn v. Guthrie (1913), 50 Sc. L. R. 863; [1913] W. C. & I. Rep. 509—Ct. of Sess.

A carter while leading a horse and lorry out of his employer's yard in the course of his employment was struck by a piece of corrugated iron blown by a high wind off the roof of an adjoining building.

HELD—that he was not injured by an accident "arising out of" his employment.

Notes.—*George Anderson & Co. (1905), Ltd. v. Adamson* [2022] distinguished. *Rodger v. Paisley School Board* [2038] and *Craske v. Wigan* [2030] referred to.

(c) INJURY BY ANIMALS.

2030.—Craske v. Wigan, [1909] 2 K. B. 635; 78 L. J. K. B. 994; 101 L. T. 6; 53 S. J. 560; 25 T. L. R. 632; 2 B. W. C. C. 35—C. A.

In the case of a claim for compensation under s. 1, sub-s. 1, of the Workmen's Compensation Act, 1906, for personal injury by accident, it is not enough for the applicant to say that the accident would not have happened if he had not been engaged in the employment or had not been in the particular place in which the accident occurred. He must go further, and establish that the accident arose because of something he was doing in the course of his employment or because he was exposed by the nature of his employment to some peculiar danger.

A lady's maid in the course of her employment was one evening engaged in sewing in her employer's nursery. The electric light in the room was on, and the night being very hot the windows were open. A cockchafer flew in, and the maid in throwing up her hand to protect her face struck her right eye so violently with the bent knuckle of her right thumb that her sight was permanently affected.

HELD—that the injury was not an accident arising out of her employment, inasmuch as the risk of the occurrence in question was not incidental to the employment as a lady's maid, and she was not placed by reason of her employment in a position of special danger, and that therefore she was not entitled to compensation.

Notes.—*Andrew v. Failsworth Industrial Society* [2021], *Challis v. London and South Western Railway* [2013], and *Rowland v. Wright* [2123] distinguished. *Fitzgerald v. Clarke* [1929], applied.

2031.—Amys v. Barton, [1912] 1 K. B. 40; 81 L. J. K. B. 65, 105 L. T. 619; 28 T. L. R. 29; 5 B. W. C. C. 117; [1912] W. C. Rep. 22—C. A.

A. was engaged in threshing operations on his employer's farm. While the work was in progress some of the other workmen saw wasps upon the drum, and at the back of the machine close to A. The next day A. had a swollen leg, and complained of pain, and some days later he died from poisoning set up by a wasp sting. On an application for compensation by A.'s widow:

HELD—that, assuming that there was sufficient evidence that the accident occurred in the course of A.'s employment, there was no evidence that A.'s employment exposed him to any such special risk as would enable the court to hold that the injury to A. arose out of his employment.

In the proceedings for compensation the county court judge admitted evidence of a statement by A. to his doctor as to the cause and occasion of the accident.

HELD—that this evidence was improperly admitted.

Notes.—As to the necessity of the accident arising "out of" as well as "in the course of" the employment, *Craske v. Wigan* [2030] and *Warner v. Couchman* [2024] approved of. As to the admis-

sibility of the statement of the deceased workman, *Gilbey v. Great Western Railway Co.*, 102 L. T. 202 [1916], followed. Observations of Cherry, L.J., in *Wright v. Kerrigan*, [1911] 2 Ir. R. 301 [2088], disapproved. *Mitchell v. Glamorgan Coal Co.*, 23 T. L. R. 588 [2084], referred to.

2032.—Hapelman v. Poole (1908), 25 T. L. R. 155; 2 B. W. C. C. 48—C. A.

A workman was employed by a lion tamer to look after baggage, clean out lion cages, and generally make himself useful, but it was no part of his duty to feed the lions. One afternoon the workman was left in sole charge of the cages of lions, with orders to see that no harm came to them or anyone else by reason of their fierceness. One of the lions got out of the cage and into a dressing room, but there was no evidence to show how this happened. The workman went into the dressing room and tried to drive the lion back into the cage, when the lion turned on him and killed him. In a claim by the workman's dependants against the employer under the Workmen's Compensation Act, 1906, the county court judge dismissed the claim, being of opinion that the facts were consistent only with the deceased having interfered with the lion for some purpose of his own, there being no evidence to support the theory that the lions had fought or that the deceased had acted otherwise on an emergency.

HELD (allowing the appeal)—that as the deceased had been left in charge, it was his duty to try to get the lion back into the cage, and that as he was killed in the discharge of that duty the accident arose "out of and in the course of his employment."

(d) STREET ACCIDENTS.

2033.—Pierce v. Provident Clothing and Supply Co., Ltd., [1911] 1 K. B. 997; 80 L. J. K. B. 831; 104 L. T. 473; 27 T. L. R. 299; 55 S. J. 363; 4 B. W. C. C. 242—C. A.

A canvasser and collector in the service of the respondents, while going his rounds on a bicycle, was killed by an electric car. For some nine months before the accident he had been in the habit of riding a bicycle while going his rounds, and this practice was known to and not forbidden by the respondents. The respondents, however, did not require the canvasser to use a bicycle in going his rounds.

HELD—that the accident to the canvasser arose out of and in the course of his employment, and that his widow was entitled to compensation under the Workmen's Compensation Act, 1906.

Notes.—*M'Neice v. Singer Sewing Machine Co., Ltd.* [2034], applied. *Warner v. Couchman* [2024] distinguished. *Andrew v. Failsworth Industrial Society, Ltd.* [2021]; *Kelly v. Kerry County Council* [2023] referred to.

2034.—M'Neice v. Singer Sewing Machine Co., Ltd., [1911] S. C. 12; 48 Sc. L. R. 15; 4 B. W. C. C. 351—Ct. of Sess.

A salesman and collector, while riding in a street upon a bicycle,

in the course of his employment, was kicked on the knee by a passing horse and injured.

HELD—that the injury was caused by an accident “ arising out of ” his employment.

Notes.—*Macdonald v. S.S. Banana (Owners)*, [1908] 2 K. B. 926 [1966]; *M’Kinnon v. Miller*, [1909] S. C. 380 [1953], followed.

2035.—*Greene v. Shaw* (1911), 46 Ir. L. T. 18 ; 5 B. W. C. C. 573—C. A. (Ir.).

A herd employed to look after cattle upon two farms usually rode a bicycle in going from one farm to another. One evening, as he had mounted his bicycle for the purpose of visiting one of the farms to see the cattle, a dog, his own property, ran in his way, with the result that he was thrown from the bicycle and fatally injured.

HELD—that the accident occurred “ in the course of ” but that it did not arise “ out of ” the employment.

Notes.—*Kitchenham v. S.S. Johannesburg (Owners)*, [1911] A. C. 417 [1930], followed. *M’Neice v. Singer Sewing Machine Co., Ltd.* [2034]; *Pierce v. Provident Clothing and Supply Co., Ltd.* [2033], distinguished.

2036.—*Butt v. Provident Clothing and Supply Co., Ltd.* (1913), 6 B. W. C. C. 18 ; [1913] W. C. & I. Rep. 119—C. A.

A workman employed as an assistant superintendent by a firm of credit tailors was killed by a fall from his bicycle, due to some defect in the machine. It was part of his duty to call on customers, but there was no evidence that the use of a bicycle was in any way necessary to his work ; the employers were unaware that he did use it, and would have forbidden it had they known. The fall occurred fifteen minutes after he had made a business call on the bicycle, and five minutes after he had called for a bicycle lamp at his own home, which was on the way back to the office. There was no evidence that he wanted the lamp for business work.

HELD—that the accident did not arise out of and in the course of the employment.

Notes.—*Pierce v. Provident Clothing and Supply Co., Ltd.* [2033] distinguished. See also *Edwards v. Wingham Agricultural Implements Co.* [2098].

2037.—*Millar v. Refuge Assurance Co., Ltd.*, [1912] S. C. 37 ; 49 Sc. L. R. 67 ; 5 B. W. C. C. 522—Ct. of Sess.

An insurance agent, whose duties consisted in going from door to door collecting premiums, while in the course of his employment fell down a stair and sustained severe injuries.

HELD—that the accident arose out of his employment in the sense of the Workmen’s Compensation Act, 1906.

Notes.—This case is also noted *post* [2272]. *Kitchenham v. S.S. Johannesburg (Owners)*, and *Leach v. Oakley, Street & Co.*, [1911] 1 K. B. 523 [1931], applied.

2038.—Rodger v. Paisley School Board, [1912] S. C. 584; 49 Sc. L. R. 413; 5 B. W. C. C. 547; [1912] W. C. Rep. 157—Ct. of Sess.

A school janitor, while in the course of his employment taking a message from the headmaster to another headmaster, fainted in the street owing to the heat of the day, and fell backwards, striking his head on the stone pavement.

HELD—that the injury by accident did not arise “out of” his employment in the sense of s. 1 of the Workmen’s Compensation Act, 1906.

Notes.—*Per* the Lord President: “If you said, ‘to what kind of danger does the janitor’s employment (including in that employment having to go messages) expose him?’ you might say ‘being run over in the street,’ but you would never say, I think, ‘the fact that if he fell down, his head would hit something hard.’ He might have had this fainting fit in his own room and fallen against the fender, and he might, on the other hand, have fallen upon a soft rug in a room and upon some comparatively soft surface in the street.” *Andrew v. Failsworth Industrial Society* [2021]; *Kelly v. Kerry County Council* [2023] discussed. *Murray v. Denholme*, [1911] S. C., at p. 1102 [1890]; *Blakey v. Robson, Eckford & Co.* [2028]; *Fitzgerald v. Clarke*, [1908] 2 K. B. 796, at p. 800 [1929], referred to. *Wicks v. Dowell & Co.* [2027] distinguished on the ground that in that case the nature of the employment made it necessary that the workman should be stationed at the edge of a ship’s hold, and therefore it exposed him to a risk, if he did faint, to which ordinary people are not exposed.

(2) *Risks not Incidental to Employment.*

2039.—Barnes v. Nunnery Colliery Co., Ltd., [1912] A. C. 44; 81 L. J. K. B. 213; 105 L. T. 961; 28 T. L. R. 135; 56 S. J. 159; 49 Sc. L. R. 688; 5 B. W. C. C. 195; [1912] W. C. Rep. 90—H. L.

A boy in a colliery, in order to get to the place where he was about to work, got into an empty tub which was being hauled on an endless chain, and while so riding in the tub received fatal injuries through his head striking the roof. A rule of the colliery prohibited boys in the mine from riding in empty tubs. There was a notice to this effect in the colliery, and fines were inflicted on boys found breaking the rule. But the boys frequently did ride in the tubs when they could do so without being caught.

HELD—that there was no evidence that the accident arose out of the boy’s employment, and that the boy’s death was caused by an added peril to which the boy by his own conduct exposed himself, and not by any peril involved by his contract of service.

Notes.—*Brice v. Edward Lloyd, Ltd.* [2046] followed. *Robertson v. Allan* [1963] distinguished. It must be remembered that this and similar cases involve pure questions of fact, in regard to which the only function of the court is to interpose when there is no evidence to support a particular finding. See the judgment of the Lord

Chancellor in this case. See also *Gallant v. S.S. Gabir* [1978] and *Watkins v. Guest, Keen and Nettlefolds, Ltd.* [1975].

2040.—*Bates v. Mirfield Coal Co.* (1913), 6 B. W. C. C. 165 ; [1913] W. C. & I. Rep. 180—C. A.

Three miners, requiring to leave the mine, walked along the haulage road to get to the pit bottom. Two said they were going to wait for a tub to come along upon which to ride. The third hurried on, saying he would wait for the others at the pit bottom. At that time the haulage rope was stationary, but it soon started and a tub came along on to which the two miners jumped. They had not proceeded far when they heard a cry from the miner in front. They stopped the line of tubs and found the miner lying across the rails injured in such a way as could only reasonably have happened by his riding on a tub and striking his head against the roof which sloped down at that place. There was a tub eleven yards in front of where he had fallen, which had been moving in the same direction. It was against the rules of the colliery to ride on the tubs. From these facts the county court judge inferred that the accident was caused by the miner riding on a tub, and therefore held (following *Barnes v. Nunnery Colliery Co., Ltd.* [2039]) that the accident did not arise out of the employment.

HELD—that the facts supported the inference.

2041.—*Plumb v. Cobden Flour Mills Co.*, [1913] W. C. & I. Rep. 209 ; 108 L. T. 161 ; 57 S. J. 264 ; 29 T. L. R. 232 ; 6 B. W. C. C. 245—C. A.

The applicant's duty was to stack sacks in a particular room in a mill. Along the top of the room there ran a shaft on which were fastened pulleys driven by belting and used for the various requirements of the employers' mill. The day before the accident happened the applicant had, for the first time, hoisted bundles of sacks to the top of the stack by throwing a rope over the shafting, making one end of the rope fast to a bundle, and then, when the revolving shaft had hauled the bundle to the top of the stack, removing it. On the day of the accident, while hoisting a bundle in this way, the applicant's arm became entangled with the shaft and was injured. On a claim for compensation under the Workmen's Compensation Act, 1906, the county court judge made an award in favour of the applicant, being of opinion that, although the method adopted by the applicant of hoisting the sacks was unwise, it was not done for his greater convenience or pleasure or profit, but the better to discharge his duty in the interests of the employers. On appeal by the employers :

HELD (allowing the appeal)—that the method of doing the work adopted by the applicant was altogether outside the scope of his employment.

Notes.—Barnes v. Nunnery Colliery Co., Ltd. [2039] followed.

2042.—Murray v. Allan Brothers & Co. (U.K.) Ltd., [1913] W. C. & I. Rep. 193 ; 6 B. W. C. C. 215—C. A.

A boiler scaler returning to the vessel on which he was employed was returning by the shortest way, which passed along a quay near the bows of the vessel, which were being repaired by contractors. This passage was fenced off with guard ropes and a danger notice was exhibited. The man nevertheless entered the dangerous area and remained there a few minutes watching the repairing. A rope making fast the bows of the ship to the quay broke and killed him. There was a safe but longer way of approach.

HELD—that the deceased was accepting an unnecessary risk and one not incidental to his employment, and that the accident did not therefore arise “out of” the employment within s. 1, sub-s. 1, of the Workmen’s Compensation Act, 1906.

2043.—Williams v. Wigan Coal and Iron Co., Ltd. (1909), 3 B. W. C. C. 65—C. A.

A stoker on a locomotive engine was paid by mistake the wages of another man X. He left his engine and went over to another engine which X. was working in order to give him these wages. This engine was travelling at about five miles an hour. The workman attempted to board the engine by grasping the rails at the side of the doorway, missed the step and sustained personal injuries by the wheels of the engine passing over his foot.

HELD—that the attempt to board the engine whilst in motion was obviously dangerous and wholly unnecessary, and that the accident did not arise out of and in the course of his employment.

Notes.—*Reed v. Great Western Railway* [2058] and *Brice v. Lloyd* [2046] referred to.

2044.—Powell v. Brynddu Colliery Co. (1911), 5 B. W. C. C. 124—C. A.

A collier going from one part of the mine to another rode on the coupling between two trams, in breach of the colliery rules. His head was knocked against the roof, and he died from the injuries so received.

HELD—the accident did not arise out of the employment.

Notes.—*Barnes v. Nunnery Colliery Co., Ltd.* [2039] followed. *Harding v. Brynddu Colliery Co.* [1974] distinguished.

2045.—Wemyss Coal Co., Ltd. v. Symon, [1912] S. C. 1239 ; 49 Sc. L. R. 921 ; [1912] W. C. Rep. 336 ; 6 B. W. C. C. 298—Ct. of Sess.

A message clerk who was sent a message by his employers, and had been provided with money to pay his tramway fare, was seriously and permanently injured while attempting to board, a short distance from its stopping-place, a car which was moving at the rate of five

miles an hour. He acted without invitation and contrary to a notice on the car, of which he was aware.

HELD—that the accident did not arise out of and in the course of his employment.

Notes.—*Revie v. Cumming*, [1911] S. C. 1032 [2062], followed. *Brice v. Lloyd* [2046]; *Murray v. Denholm & Co.*, [1911] S. C. 1087 [1890], cited. *Whitehead v. Reader*, [1901] 2 K. B. 48 [1972]; *Martin v. Fullerton & Co.* [2053]; *Conway v. Pumpherson Oil Co.*, [1911] S. C. 660 [1973]; *Evans v. Astley*, [1911] A. C. 674 [1939]; *Johnson v. Marshall, Sons, & Co., Ltd.*, [1906] A. C. 409 [2163]; *Millar v. Refuge Assurance Co.* [2037] distinguished.

2046.—*Brice v. Edward Lloyd, Ltd.* [1909] 2 K. B. 804; 79 L. J. K. B. 37; 101 L. T. 472; 53 S. J. 744; 25 T. L. R. 759; 2 B. W. C. C. 26—C. A.

A workman was employed in the defendants' works. In those works there was a large hot-water tank, five and a-half feet from the floor, and to get to the top of it there was a platform, the top of the tank being two and a-half feet higher than the platform. No one except the chief engineer and the chief stoker was allowed to deal with the tank in any way. The room in which the tank was situated was about 156 yards from the room in which the particular workman was employed. One night, while working on the night shift, the workman ate his supper at the top of the tank, and when he had finished and was about to go back to his work he fell through an aperture into the tank and thereby sustained injuries which resulted in his death.

HELD—that the accident did not arise out of the workman's employment.

Notes.—*Blovelt v. Sawyer*, [1904] 1 K. B. 271 [2122]; *Morris v. Mayor of Lambeth*, 22 T. L. R. 22 [2124]; *Gane v. Norton Hill Colliery Co.*, [1909] 2 K. B. 539 [2099]; *Challis v. London and South Western Railway Co.*, [1905] 2 K. B. 154 [2013], referred to.

2047.—*McKeown v. McMurray* (1911), 45 I. L. T. 190—C. A. (Ir.).

Where one of two flagmen, whose duty it was alternately to walk in front of a traction engine and, when not in front, to ride in a van at the rear, got up on the draw-bar on which he had been warned not to go, but on which he and others had sometimes ridden to the knowledge of the employer, and, having slipped, had his foot crushed by the traction engine:

HELD—that the accident did not arise out of the employment.

Notes.—*Brice v. Lloyd* [2046] followed.

2048.—*M'Laren v. Caledonian Railway Co.*, [1911] S. C. 1075; 48 Sc. L. R. 885; 5 B. W. C. C. 492—Ct. of Sess.

A canal overseer in the employment of a railway company, in returning to his office on the canal from a railway station where he had been in the course of his duties, went along the railway line, which

was shorter, instead of going by road. While walking along the line he was knocked down by a train and received injuries from which he died.

HELD—that though the accident arose “in the course of” the deceased’s employment, it had not arisen “out of” his employment.

Notes.—*Haley v. United Collieries*, [1907] S. C., at p. 316 [2119]; *Kitchenham v. S.S. Johannesburg (Owners)*, [1911] 1 K. B. 523 [1930]; *Revie v. Cumming*, [1911] S. C. 1032 [2062], referred to.

2049.—*Pope v. Hill’s Plymouth Co.* (1910), 102 L. T. 632—C. A. Affirmed 105 L. T. 678; 5 B. W. C. C. 175; [1912] W. C. Rep. 15—H. L.

A workman proceeding to his home by a route that he was permitted to use in going to and from his work committed a breach of his employer’s regulations by attempting to get on a moving tram, in order to be carried up an incline which was on the way to his home. He fell and was killed.

HELD—that the workman was needlessly and improperly exposing himself to risk by his act; that the accident which occurred to him did not “arise out of and in the course of” his employment; and that therefore his employers were not liable to pay his dependants compensation.

Notes.—*Morrison v. Clyde Navigation Trustees*, 46 Sc. L. R. 40 [2059], and *Brice v. Edward Lloyd Ltd.*, [2046] approved and followed. *Gane v. Norton Hill Colliery Co.*, [1909] 2 K. B. 539 [2099], distinguished.

2050.—*Parker v. Pout (or Pont)* (1911), 105 L. T. 493; 5 B. W. C. C. 45—C. A.

The applicant was employed on different farms belonging to the respondent. Having finished his work at one farm, the applicant was proceeding to another, about two miles distant by road, for the purpose of receiving his day’s pay and to enquire about the work for the next day. Finding an empty cart belonging to the respondent returning to the same farm, the applicant attempted to get into it, and while so doing an accident occurred to him. The respondent’s workmen not unfrequently returned in such an empty cart, and this fact was known to the respondent.

HELD—that it was no part of the applicant’s contract of service that he should travel to his employer’s farm by a cart, whereby he added unnecessarily to the risk of his employer; and that therefore he was not entitled to compensation under the Workmen’s Compensation Act, 1906.

2051.—*McDaid v. Steel*, [1911] S. C. 859; 48 Sc. L. R. 765; 4 B. W. C. C. 412—Ct. of Sess.

A message boy who was employed in delivering fish at a kitchen situated on the third floor of an infirmary was injured while making his way from the ground floor to the third floor by means of a hoist

which he had entered and caused to ascend. There was a notice at the side of the hoist to the effect that it was only to be used by servants of the institution, and worked only by those specially authorised by the directors, but it was not proved that the boy had read the notice, or had his attention directed to it, though it was proved that he had been cautioned against using the hoist.

HELD—that the accident did not arise out of and in the course of his employment.

2052.—Kane v. Merry and Cunninghame, Ltd., [1911] S. C. 533 ; 48 Sc. L. R. 430 ; 4 B. W. C. C. 379—Ct. of Sess.

A brusher in a mine who had finished his work for the day jumped on the last of three hutches which were being taken by a pony to the pit bottom. On the way he was knocked off the hutch by his head coming into contact with two crowns which were below the ordinary pit level, and he sustained serious and permanent injury. A special rule, of which the injured man was cognisant, forbade miners from riding on the hutches.

HELD—that the injury was not caused by an accident “ arising out of ” the workman’s employment.

Notes.—Glasgow Coal Co. v. Sneddon (1905), 7 F. 485 [2167], distinguished.

2053.—Martin v. Fullerton, [1908] S. C. 1030 ; 45 Sc. L. R. 812 ; 1 B. W. C. C. 168.—Ct. of Sess.

A workman engaged in overtime work on a vessel went ashore at night, against the orders of his foreman, to purchase bread. The vessel was moored six or seven feet from the quay, and a gangway was, to the knowledge of the workman, placed between the vessel and the quay. The deck of the vessel was three feet above the quay. The workman in returning went past the end of the gangway and attempted to jump from the quay to the vessel, but fell into the water and was drowned. It was a rule of the employment (which, however, was frequently broken) that men should not jump between the vessel and the quay, and the deceased had been warned against this practice.

HELD—that the accident did not arise out of and in the course of the deceased’s employment.

2054.—Peel v. William Lawrence & Sons, Ltd. (1912), 106 L. T. 482 ; 28 T. L. R. 318 ; 5 B. W. C. C. 274 ; [1912] W. C. Rep. 141—C. A.

In the cotton mill where the applicant was a minder it was the practice for the workers, for their own convenience or in order to do more efficient work, to take off their coats and waistcoats, and usually, although not universally, they also worked without socks. The applicant, just before commencing work, injured his finger in the course of removing a sock, and was thereby incapacitated for some time from doing his work.

HELD—that although the accident arose “ in the course of ” the

employment, it did not arise "out of" the employment, and therefore that the applicant was not entitled to compensation under the Workmen's Compensation Act, 1906.

Notes.—*Warner v. Couchman*, [1912] A. C. 35 [2024], followed *Andrew v. Failsworth Industrial Society*, [1904] 2 K. B. 32 [2021], referred to.

2055.—*Butler v. Burton-on-Trent Union* (1912), 106 L. T. 824; 5 B. W. C. C. 355; [1912] W. C. Rep. 222—C. A.

The master of a workhouse was sitting on the top of some steps leading to his residence at the workhouse, there being nothing peculiar or particularly dangerous about them, talking to the labour master, when a fit of coughing came on, caused by a disease of his lung, which made him giddy, and he fell down the steps and received an injury which caused his death a few days afterwards.

HELD—that there was no evidence to support a finding that the accident arose out of his employment.

2056.—*Joyce v. Wellingborough Iron Co.* (1911), 5 B. W. C. C. 126—C. A.

A quarryman was ramming a cartridge preparatory to blasting. The cartridge exploded prematurely and injured him. The employers alleged that the workman was acting outside the scope of his employment, in breach of certain rules as to shot firing. The rules, in fact, related only to the firing of shots, and not to loading. The explosion occurred while loading.

HELD—that the accident arose out of the employment.

2057.—*Richardson v. Denton Colliery Co., Ltd.* (1913), 6 B. W. C. C. 629; [1913] W. C. & I. Rep. 554—C. A.

A collier met his death by accident while riding on a tub between the pit bottom and his place of work. By the special rules of the colliery, riding on tubs was forbidden except where permitted by the manager or "under-looker," but there was no evidence that the deceased knew of the prohibition. Such permission had been given as to certain parts of the mine, through the fireman on duty there, but not as to the part where the accident happened. There was evidence that it was the regular practice of men returning from the night shift in this part of the mine to ride on tubs when they could. By a special rule it was part of the fireman's duty to see that the rules were obeyed; but he, finding the practice existing when he was put on duty in that part of the mine, and believing that it had been authorised before he came, never interfered with it.

HELD—that the accident arose out of the employment.

Notes.—*Barnes v. Nunnery Colliery Co., Ltd.* [1912] A. C. 44 [2039], distinguished (*per* Cozens-Hardy, M.R.), on the ground that in that case "it was found as a fact that the boy who was killed knew that what he was doing was contrary to the rules, and knew it was prohibited and prevented whenever possible." See also *Logue v. Fullerton*, 3 F. 1006 [2192].

IV. *Acts done by a Workman for his own Purpose.*

2058.—Reed v. Great Western Railway, [1909] A. C. 31; 78 L. J. K. B. 31; 99 L. T. 781; 25 T. L. R. 36; 2 B. W. C. C. 109—H. L.

An accident which happens during the temporary absence for purposes of his own of the workman from his place of duty does not arise "out of and in the course of the employment," and no compensation is payable in respect thereof under the Workmen's Compensation Act, 1897. Thus, where an engine driver leaves his engine and crosses a siding, for purposes of his own, and on returning is killed by a waggon being shunted, such accident does not arise "out of and in the course of his employment."

Notes.—Lord Loreburn, L.C., expressed his view of the law to be as follows: "I agree that labour is often intermittent. If a man is in the place of his employment and during its hours uses such intervals otherwise than in working, and while doing so is injured by one of the dangers to which the employment exposes him, that may be an accident within the statute. He may be in such a case required to be in attendance, and in that respect engaged on his duty, though not actually doing work. But here this man was where he was not entitled to be, and was not working, but pleasing himself. It is not that he thereby violated a rule, but that the accident did not arise out of or take place in the course of the employment at all. It took place while for the moment he quitted his employment. No doubt allowance must be made for the habits of business, and the Act must be applied reasonably, but in this case I can see no ground for allowing compensation."

2059.—Morrison v. Clyde Navigation Trustees, [1909] S. C. 59; 46 Sc. L. R. 38; 2 B. W. C. C. 99—Ct. of Sess.

A workman employed as a capstan man in a dock, going home at the dinner-hour, was, before he reached the dock gates, overtaken by an engine and trucks on an adjoining railway. The workman, in attempting to mount one of the trucks for the purpose of being carried to the dock gates, was seriously injured.

HELD—that the accident did not arise out of his employment.

Notes.—*Reed v. Great Western Railway Co.*, [1908] 25 T. L. R. 36 [2058], followed. *Smith v. Lancashire and Yorkshire Railway Co.*, [1899] 1 Q. B. 141 [1928]; *Benson v. Lancashire and Yorkshire Railway Co.*, [1904] 1 K. B. 242 [2100], cited.

2060.—Hendry v. Caledonian Railway, [1907] S. C. 732; 44 Sc. L. R. 584—Ct. of Sess.

A fish porter in the employment of a fish stevedore, who had a contract with a railway company for the portorage of fish delivered at one of their stations, left the siding where the trucks were customarily discharged, and going along the line of railway was run down and killed by a railway engine near a shunter's bothy, to which the fish porters were in the habit of going in order to find out the

number of fish boxes that were in transit. The sheriff found, in fact, that the fish porters had no right to walk along the railway, that they had never been instructed by anyone to go to the bothy to find out the number of fish boxes that were in transit, and that the information was not of any use to them, or to their employer, the fish stevedore, in their work.

HELD—that the deceased had not been killed through an accident arising out of and in the course of his employment, within the meaning of s. 1, sub-s. 1, of the Workmen's Compensation Act, 1897.

Notes.—*Goodlet v. Caledonian Railway Co.*, 4 F. 986 [2070], a case in which the ordinary employment of the workman frequently necessitated his presence on the railway line, distinguished. The court were of the opinion that the workman in this case was not at the time and place he met with his death really in any different position from that of an ordinary member of the public.

2061.—*Callaghan v. Maxwell* (1900), 2 F. 420; 37 Sc. L. R. 313—Ct. of Sess.

A girl employed as a farm servant by the defender was engaged on the platform of a steam threshing machine, her duty being to pass the sheaves to the millman. She was specially directed to remain at her place, and warned of the danger of moving about; but, notwithstanding this, she, in the absence of the millman, attempted to step across the opening through which the mill was fed with sheaves, in order to speak to another servant. In attempting to cross her foot slipped and she was caught in the machinery and injured. For the performance of her work she did not require to speak to the other servant or to leave her place.

HELD—that the accident was one not “arising out of and in the course of” her employment, and also that she had been guilty of “serious and wilful misconduct.”

2062.—*Revie v. Cumming*, [1911] S. C. 1032; 48 Sc. L. R. 831; 5 B. W. C. C. 483—Ct. of Sess.

A carter employed as a brakesman had as his duty to walk continuously at the rear of a lorry, ready to apply the brakes when directed to do so by the driver. He got upon the lorry, which he was expressly forbidden to do, and took a seat in front by the driver, with whom he began to talk on matters which had nothing to do with the work on hand. While he was in that position the driver called upon him to put on the brakes. In jumping off the lorry, with the intention of obeying the order, he fell and was injured.

HELD—that the facts justified a finding that the accident did not arise out of his employment in the sense of the Workmen's Compensation Act, 1906.

Notes.—*Brice v. Edward Lloyd, Ltd.*, [1909] 2 K. B. 804 [2046], cited.

2063.—Wemyss Coal Co., Ltd. v. Symon, [1912] S. C. 1239 ; 49 Sc. L. R. 921 ; 6 B. W. C. C. 298 ; [1912] W. C. Rep. 336—Ct. of Sess.

A message clerk who was sent a message by his employers, and had been provided with money to pay his tramway fare, was seriously and permanently injured whilst attempting to board, a short distance from its stopping place, a car which was moving at the rate of five miles an hour. He acted without invitation and contrary to a notice on the car, of which he was aware.

HELD—that the accident did not arise out of and in the course of his employment.

Notes.—This case is noted, *ante* [2045].

2064.—McGrath v. London and North Western Railway [1913], W. C. & I. Rep. 198 ; 6 B. W. C. C. 251—C. A.

A messenger boy employed by a railway company crossed the lines without permission, in contravention of the rules of the company, for his own purposes, and was run over and killed. In proceedings by his father claiming compensation :

HELD—that the accident did not arise “ out of ” the employment within s. 1, sub-s. 1, of the Workmen's Compensation Act, 1906.

2065.—Warren v. Hedley's Colliery Co., Ltd. (1913), 6 B. W. C. C. 136 ; [1913], W. C. & I. Rep. 172—C. A.

A collier was employed to work in a special stall in a mine. At regular intervals a haulier brought trucks to take the coal away. On the night in question the collier commenced work at 11 p.m., and would have had to leave the mine at 7 a.m. The haulier on one occasion seemed late in coming, and the collier walked some distance away to ascertain the time from two other colliers. The time was 4.20. On his return journey he was killed by a fall of the roof. The county court judge found that the collier had not gone to see the time in the interests of his employers, and that there was a temporary interruption of the employment.

HELD—that there was evidence to support his finding that the accident did not arise out of or in the course of the employment.

Notes.—*Per* Cozens-Hardy, M.R. : “ I do not think there is any real difficulty in the legal principle which ought to be applied, namely, that there must be evidence to show, beyond reasonable doubt, that the accident happened in the course of the employment. If the accident happened during a break in the workman's employment, by which I understand a departure by the workman for his own purposes from the place of his work, it is not seriously disputed that, in that case, he will have lost the right to compensation, because the accident will have happened when he is not in the course of his employment, and obviously the accident does not arise out of the employment. On the other hand, if the workman goes where it was not his duty to go, and practically gets back and resumes his work before the accident happens, the fact that he went away does

not in any way disentitle him to the protection of the Act." *Low or Jackson v. General Steam Fishing Co.*, [1909] A. C. 523 [1959]; *Evans & Co. v. Astley*, [1911] A. C. 1036 [1939]; *Owners of Ship Swansea Vale v. Price* [1951], referred to.

2066.—*Bates v. Davies' Executors* (1909), 126 L. T. Jo. 454; 2 B. W. C. C. 459—County Court.

A workman was sent an errand; he loitered on his way back, and wasted time with friends, so that he took two hours to go about a mile, at the end of which he had an accident.

HELD—not arising out of and in the course of his employment.

2067.—*Everitt v. Eastaff & Co.* (1913), 6 B. W. C. C. 184; [1913] W. C. & I. Rep. 164—C. A.

A carter was sent with a horse and cart to deliver a load of sand. Instead of returning to his employers' yard by the nearest and ordinary way, he went back by another road, which was only a little further, and stopped at a public-house for a drink. On resuming his journey back, the horse ran away and he was thrown out of the cart and killed.

HELD—that the accident did not arise out of and in the course of the man's employment.

2068.—*Horsfall v. Steamship Jura (Owners)*, [1913] W. C. & I. Rep. 183; 6 B. W. C. C. 213—C. A.

A mate of a ship was ordered by his captain to go to his room for being drunk, but instead of going to his room, he went in another direction to speak to someone on a personal matter, and fell down a hatchway, and died from the effects of the fall.

HELD—that the deceased was taken out of his employment by the order of the captain and that the accident did not arise "out of" the employment within s. 1, sub-s. 1, of the Workmen's Compensation Act, 1906.

2069.—*Clifford v. Joy* (1909), 43 I. L. T. 192; 2 B. W. C. C. 32—C. A. (Ir.)

A domestic servant who was outside the door of her employer's house drying her hair returned, in response to an order, to the house to take charge of a baby in a cradle within a couple of feet of the fire. She continued whilst so engaged the operation of drying her hair; her sleeve was loose and caught fire, and from the injuries received she died. No one witnessed the occurrence, but according to a statement made by the girl herself after the happening of the accident, her clothes caught fire whilst she was drying her hair.

HELD—that the accident did not arise out of and as an incident of the employment.

2070.—Goodlet v. Caledonian Railway Co., 4 F. 986; 39 Sc. L. R. 759
—Ct. of Sess.

An engine-driver in the employment of a railway company, having brought a train into a station belonging to the company about 10 p.m., was ordered to take his engine into a particular bye in the station, there to await his next duty, which was to take a train out of the station at 11 p.m. Having taken his engine into the bye, he left the engine and crossed over four or five sets of rails to ask a traffic regulator in the company's employment why he had been sent to that particular bye, which was not his usual bye. He then crossed two more sets of rails to a point about twelve or thirteen yards further from his engine, where he spoke for a moment or two to another of the company's employes. This conversation was merely a casual conversation, and had nothing to do with his duties as an engine-driver. Immediately afterwards, while recrossing the last-mentioned lines of rails on his way back to his engine, he was knocked down and killed by a train that was being shunted.

HELD—that the accident was one arising out of and in the course of his employment.

Notes.—*Smith v. Lancashire and Yorkshire Railway* [1899] 1 Q. B. 141 [1928], distinguished. And see *Ismay v. Williamson* [1852]; *Clover, Clayton & Co. v. Hughes* [1879]; and *Wilkes v. Dowell & Co.* [2027]. Compare *Benson v. Lancashire and Yorkshire Railway* [2100].

2071.—M'Lauchlan v. Anderson, [1911] S. C. 529; 48 Sc. L. R. 349;
4 B. W. C. C. 376—Ct. of Sess.

A workman was employed as labourer in connection with loading and unloading waggons, and accompanying them while being hauled by a traction engine from one quarry to another. While sitting on a waggon which was being so hauled, he dropped his pipe, and in attempting to get down to recover it he lost his balance and fell in front of the wheels of the waggon, which went over his left leg, fatally injuring him.

HELD—that the accident arose out of and in the course of the employment.

Notes.—*Moore v. Manchester Liners* [1910] A. C. 498 [1965]; *Keenan v. Flemington Coal Co., Ltd.*, 5 F. 164 [2125], followed.

2072.—Cokolon v. Owners of Ship Kentra (1912), 5 B. W. C. C. 658;
[1912] W. C. Rep. 380—C. A.

A sailor, washing his clothes in a dark alley-way, fell down a half-open hatchway and was injured. The county court judge found that it was necessary to wash his clothes, and that he was doing it in a reasonable place and manner.

HELD—that the accident arose out of the employment.

2073.—Edmunds v. Owners of S.S. Peterston (1911), 28 T. L. R. 18 ; 5 B. W. C. C. 157—C. A.

While the respondents' steamship was lying in port in the Black Sea in February, 1911, the second engineer, on account of the intensity of the cold, rigged up a stove in his cabin. He had been allowed by the chief engineer to use the stove during the daytime, but was forbidden to use it at night, as it was dangerous. On February 9th there was no fire in the stove at 11 p.m., but apparently the second engineer lit the fire at some period of the night, and he was found dead the next morning, having been asphyxiated by the fumes of the fire. On an application by his dependant for compensation under the Workmen's Compensation Act, 1906, the county court judge held that the accident arose out of and in the course of the deceased's employment ; he accordingly made an award of compensation.

HELD (Cozens-Hardy, M.R., doubting)—that there was evidence upon which the county court judge could find as he did.

HELD FURTHER—A county court judge sitting as arbitrator under the Workmen's Compensation Act ought not to delegate to the registrar the duty of taking evidence.

V. *Larking.*

2074.—Cole v. Evans, Son, Leshner and Webb, Ltd. (1911), 4 B. W. C. C. 138—C. A.

A lad set to clean a machine at rest was larking with another lad, the consequence of which was that he accidentally started the machine, thereby injuring himself.

HELD—that the accident did not arise out of the employment.

Notes.—*Furniss v. Gartside & Co., Ltd.* [2075] followed.

Cozens-Hardy, M.R., in his judgment, said : " It would be almost shocking if we were to hold that an accident arising through larking entitled a man to compensation. Here the accident did not occur in any sense while the applicant was doing or attempting to do his master's work."

2075.—Furniss v. Gartside & Co., Ltd. (1910), 3 B. W. C. C. 411—C. A.

A boy who had charge of the handle of a machine, lifted off the cover over some pinion wheels and played with them, with the result that his hands were caught in the wheels and the end of one of his fingers was torn off. He had orders not to lift the cover or touch the pinion wheels.

HELD—that the accident did not arise out of and in the course of his employment.

2076.—Falconer v. London and Glasgow Engineering and Iron Shipbuilding Co., Ltd. (1901), 3 F. 564 ; 31 Sc. L. R. 381—Ct. of Sess.

A workman in the course of his employment met with an accident

caused by his fellow-workmen, who at the time were not engaged at their work, but were indulging in horse-play.

HELD (Lord Moncreiff *diss.*)—that the accident was not one arising “out of” the employment in the sense of s. 1, sub-s. 1, of the Act, and that the injured workman was not entitled to compensation under the Act.

2077.—Wrigley v. Nasmyth, Wilson & Co., Ltd. (1913), 6 B. W. C. C. 90; [1913] W. C. & I. Rep. 145—C. A.

A workman went for some purpose to a fellow workman in a workshop; on parting he tapped his friend on the back with a rule and received a push in return from which he fell and was injured. The county court judge found they were larking.

HELD—that the accident did not arise out of and in the course of the employment.

2078.—Burley v. Baird & Co., Ltd. [1908] S. C. 545; 45 Sc. L. R. 416; 1 B. W. C. C. 7—Ct. of Sess.

Smith and Paton, two drawers in a coal pit, were sitting in a hutch, Smith driving the horse. In passing near the working place of another drawer, Burley, Paton took hold of a hutch Burley had been using and pulled it after him. Burley followed, and in endeavouring to recapture his hutch, pushed Paton with a prop. Paton then threw some rubbish at Burley; in avoiding the rubbish Burley struck his head against a projection on the wall and was injured. Burley having claimed compensation under the Workmen's Compensation Act, 1897.

HELD (Lord Stormonth-Darling, *diss.*)—that, although the accident arose in the course of Burley's employment, it did not arise out of it within the meaning of s. 1, sub-s. 1, of the Act.

Notes.—*Falconer v. London and Glasgow Engineering and Ship-building Co., Ltd.* [2076]; *Armitage v. Lancashire and Yorkshire Railway* [1902] 2 K. B. 178 [2015], followed. *Challis v. London and South Western Railway*, [1905] 2 K. B. 154 [2113], distinguished. *M'Intyre v. Rodger* [2082] referred to.

2079.—Wilson v. Laing, [1909] S. C. 1230; 46 Sc. L. R. 843; 2 B. W. C. C. 118—Ct. of Sess.

A domestic servant, while in the course of her duties, was struck on the eye and blinded by a ball thrown at her in play by a fellow-servant.

HELD—that the accident did not arise out of the employment of the injured servant.

Notes.—*Burley v. Baird & Co., Ltd.* [2078] followed.

2080.—*Hillis v. Shaw*, [1913] W. C. & I. Rep. 744; 47 Ir. L. T. R. 221—C. A. (Ir.).

A domestic servant whilst in the course of her employment was accidentally shot and injured by a farm labourer who was carrying a gun from the house to the fields, where it was required by the employer for the purpose of shooting crows. In reply to the question, "Did he present it at you in a joke?" put by the county court judge, the injured servant stated, "He might have pointed it at me: it was not intended."

HELD—that the evidence given by the servant herself was sufficient to justify the conclusion that the injury was caused by the larking or fooling of the labourer; and that therefore this was not an accident arising out of the employment within the meaning of s. 1, subs. 1, of the Workmen's Compensation Act, 1906.

2081.—*Mullen v. Stewart*, [1908] S. C. 991; 45 Sc. L. R. 729; 1 B. W. C. C. 204—Ct. of Sess.

Mullen, a workman, justifiably left the works in which he was employed, to obtain refreshment. While returning to his work he met a squad of his fellow workmen, who were engaged in hauling a bogie across a public street which intersected the works. M'Ginlay, a fellow-workman of Mullen, came up and improperly seized the rope by which the bogie was being hauled, and began to pull against the squad. In doing this M'Ginlay slipped and fell over the rope, and was in danger of being injured by the bogie. Mullen came to M'Ginlay's assistance, and succeeded in rescuing him from danger, but before he himself could get out of the way he was jammed by the bogie and sustained severe injuries.

HELD—that Mullen had not been injured by accident arising out of and in the course of his employment.

Notes.—*London and Edinburgh Shipping Co. v. Brown*, 7 F. 488 [2011], distinguished on the ground that in that case both the man injured and the man he was attempting to rescue were engaged on their master's work at the time of the accident. Compare also *Rees v. Thomas* [2009].

2082.—*McIntyre v. Rodger* (1903), 6 F. 176; 41 Sc. L. R. 107—Ct. of Sess.

M., a workman, was oiling with a brush a machine at which he was working. The brush was not the brush belonging to the machine, and M. knew this. While M. was so engaged, C., a fellow-workman to whose machine the brush belonged and who required it for his work, came up angrily, said the brush was his, and took hold of it. M. asked C. to wait a moment, but C pulled the brush out of C.'s hand, and in doing so unintentionally injured M.'s hand by drawing it across a sharp piece of iron:

HELD—that the injury to M. was caused by an accident arising out of and in the course of his employment, and that he was therefore entitled to compensation.

Notes.—*Falconer v. London and Glasgow Engineering and Iron*

Shipbuilding Co., 3 F. 564 [2076], distinguished *per* the Lord Justice-Clerk, Lord Trayner, and Lord Moncreiff, and doubted *per* Lord Young.

(C.) IN THE COURSE OF THE EMPLOYMENT.

I. *Burden of Proof.*

N.B.—See also sub-tit. “Out of the employment,” I. “Burden of Proof,” p. 858.”

2083.—*Charvil v. Manser & Co., Ltd.* (1912), 5 B. W. C. C. 385; [1912] W. C. Rep. 193—C. A.

A workman, with his mate, was left in charge of a barge moored near a wharf. He left the cabin, when a strong tide was running down stream, and was not seen alive again. Some time later, the tide having turned in the meanwhile, he was found drowned 150 feet from the barge, up the river.

HELD—that his dependants had not discharged the burden of proof that the accident was one arising in the course of the employment.

Notes.—In this case the county court judge found that the body could not have been carried away by the adverse tide, and awarded for the employers, there being no evidence as to how the workman met his death.

2084.—*Mitchell v. Glamorgan Coal Co.* (1907), 23 T. L. R. 588—C. A.

A workman who was employed in a colliery died from blood poisoning resulting from an injury to his finger. He was working at night, and on the evening of the accident he left his home, which was just over a mile from the pit, with his finger well. He arrived at the pit with his finger uninjured. He arrived home early next morning with his finger crushed. He continued to work for some days, when blood poisoning set in, and he died. His widow claimed compensation under the Workmen's Compensation Act, 1897, but the county court judge held that he was not entitled to draw the inference that the accident arose in the course of his employment, as it might have occurred on the way home.

HELD—that the judge was at liberty to draw the inference that the accident arose in the course of the employment.

Per Sir Gorell Barnes, P.: The probability was that the accident happened at the time when the workman was at the pit, because accidents did happen there, rather than at the time when in the ordinary course of life accidents did not happen.

Notes.—*Pomfret v. Lancashire and Yorkshire Railway*, [1903] 2 K. B., at p. 721 [1932], applied.

2085.—*Jenkins v. Standard Colliery Co.* (1911), 105 L. T. 730; 28 T. L. R. 7; 5 B. W. C. C. 71—C. A.

A workman employed on the night shift in the defendants' colliery went to his work on the night of Friday, December 9th, about 11 o'clock, and returned at 7.30 the next morning. On his return there was a red patch on his right arm, and also a scratch on

his thumb. The workman died on December 21st of blood poisoning, which, according to the medical evidence, resulted from the scratch on the thumb. Evidence was given that there had been some fall of stone on the man while he was working on the Friday night. The medical testimony, however, was to the effect that the red patch on the arm was caused by inflammation from the scratch on the thumb, and that no case had ever been known in which inflammation had appeared earlier than twelve hours after the introduction of the septic poisoning. In a claim for compensation by the workman's widow the county court judge thought there was no satisfactory direct evidence that the injury through which septic poisoning was caused was received at the colliery, but he was, however, of opinion, on the authority of *Mitchell v. Glamorgan Coal Co.* (1907), 23 T. L. R. 588 [2084], that he was entitled to infer that the probabilities were that the injury was received at the colliery, and he awarded compensation.

HELD—that there was no evidence, and nothing in the case of *Mitchell v. Glamorganshire Coal Co.*, *supra*, which entitled the county court judge to draw the inference which he did.

2086.—*Fleet v. Johnson*, [1913] W. C. & I. Rep. 149; 57 S. J. 226; 29 T. L. R. 207; 6 B. W. C. C. 60—C. A.

A bricklayer in the employment of the respondents returned from work on December 27th, 1911, with a sore on the back of the thumb of his left hand. The wound appeared to heal, but ultimately blood poisoning ensued in the armpit, and the workman died on January 30th, 1912. His dependants claimed compensation under the Workmen's Compensation Act, 1906, and evidence was given that injuries such as this were common in the case of bricklayers. The workman was engaged in cutting grooves in a wall, and had to use a hammer and chisel. In doing such work the face of the hammer might slip off the chisel and hit the workman's hand. The medical evidence was that the inflammation started under the man's armpit in the form of an abscess, due to an inflamed gland, and that an injury to the back of the thumb might give rise to this. The doctor was of opinion that the bacillus got into the man through this injury, but he said in cross-examination that he could not say that a dirty condition of the armpit might not have caused the abscess. The county court judge drew the inference that the man died from septic poisoning resulting from an injury which arose out of and in the course of his employment, and awarded compensation.

HELD—that there was evidence from which the county court judge might infer that the injury to the workman happened to him while he was at work, and further that the county court judge was justified in accepting the evidence of the doctor and holding that the workman's death was due to the accident.

2087.—*Dougal v. Westbrook*, [1913] W. C. & I. Rep. 522; 6 B. W. C. C. 705—C. A.

A lift man whose employment did not include oiling the hoist and tackle of the lift, and who had been expressly instructed not to do such work, was killed while oiling the tackle.

HELD—that there was no evidence that the accident arose “in the course of” his employment within s. 1, sub-s. 1, of the Workmen's Compensation Act, 1906.

2088.—Wright v. Kerrigan, [1911] 2 Ir. R. 301; 45 Ir. L. T. 82; 4 B. W. C. C. 432—C. A. (Ir.).

A man, aged seventy, employed at an undertaker's, and part of whose duty was lifting coffins, went to his work apparently well, and on his return complained to his wife of having been hurt that day; there were marks upon his side and chest, and his leg was swollen. He died about a week afterwards, the cause of death being pneumonia supervening on pleurisy caused by injury. There was no direct evidence showing that an accident had been sustained by the deceased in the course of his employment. He stated to the doctor who attended him that the pain of which he complained was the result of accident, and the doctor informed the employer that “deceased said that he met with an accident by the moving of a coffin.”

HELD—that there was sufficient evidence to justify the inference that an accident causing the injury from which he died had happened to the deceased arising out of and in the course of the employment.

Per Cherry, L.J.: Statements made in the absence of an employer by a deceased workman as to his bodily injuries and their immediate cause are admissible.

Notes.—*Mitchell v. Glamorgan Coal Co.* [2084] followed. See also *Amys v. Barton* [2031] and *Donaghy v. Ulster Spinning Co.* [1918].

2089.—Traynor v. R. Addie & Sons (1910), 48 Sc. L. R. 820; 4 B. W. C. C. 357—Ct. of Sess.

T., a miner, whose duty it was to work at a certain place in a mine, was informed by the fireman that he could work at another place called X. till 10 o'clock that morning, but that he was not to remain there longer, as after that hour blasting operations would commence from the opposite side, from which a new passage was being opened up. T. worked at X. till about ten, when he left and went to his regular working place, about sixty-five feet distant, where he remained till eleven, when he was left there working by his mate. About 11.45 a shot was fired opposite X. T. was killed by this shot, and his body was found among the débris at X. T. did not require to pass X. to get to the pit bottom, and the order to be away from X. was in force when the accident occurred. It was not proved what led T. to go to X., but it might have been to fetch a pick which had been left there by his mate. T.'s representatives having claimed compensation, the arbiter assoilised the defenders, holding that T. had not been injured in the course of his employment.

HELD—that there was evidence on which the arbiter might reasonably find as he did, and that the court therefore could not interfere with his decision.

Notes.—Lord Johnston considered that this case fell within the category of *O'Brien v. Star Line, Ltd.*, [1908] S. C. 1258 [1933],

and not within that of *Sneddon v. Greenfield Coal and Brick Co.*, [1910] S. C. 363 [1948]. *Miller v. North British Locomotive Co., Ltd.*, [1909] S. C. 698 [1935], referred to.

II. *Accidents to Workmen on their Way to and from Work.*

2090.—Webber v. Wansbrough Paper Co. (1913), 82 L. J. K. B. 1058; 109 L. T. 129; 29 T. L. R. 704; 6 B. W. C. C. 583; [1913] W. C. & I. Rep. 627—C. A.

A seaman going home from his ship, which was moored against the quay of a harbour, crossed a plank which was laid between the ship and a ladder fixed to the side of the quay and belonging to the harbour authority. He crossed the plank safely and ascended a few steps of the ladder, whence he fell into the harbour and injured himself.

HELD—that the accident did not arise “out of and in the course of employment” within s. 1, sub-s. 1, of the Workmen’s Compensation Act, 1906.

Notes.—In his judgment Cozens-Hardy, M.R., said: “When does employment begin and when does it end? The limits must be laid down to ascertain whether an accident arises ‘in the course of’ the employment. Two propositions are well established: (1) employment is not to be confounded with work. For example, a collier’s employment begins before he uses his pick on the face of the coal; (2) employment does not continue during the whole time occupied by going to and from the workman’s home from or to the actual place of work. For example, a sailor meets with an accident on the high road or on the quay when he was not there on ship’s business, but for his own purposes. It can make no difference whether he was going from the ship or returning to the ship. When the accident happened while he was not on the surface of the quay but on a fixed ladder forming part of the quay property and lawfully used for the purpose of getting to or from the vessel, a real difficulty arises. But I think the difficulty has been solved by the House of Lords in *Low v. General Steam Fishing Co., Ltd.* [1959].” After alluding to the facts of that case and to the decision of the Court of Appeal in *Cook v. S.S. Montreal* [2109] the Master of the Rolls continued: “I think it follows that a sailor whose sphere of employment is the ship, and not the quay, is not within the protection of the Act when he is ascending the fixed ladder attached to the quay.”

2091.—Holness v. Mackay, [1899] 2 Q. B. 319; 68 L. J. Q. B. 724; 80 L. T. 831; 47 W. R. 531; 15 T. L. R. 351—C. A.

A workman employed by contractors, in the course of the execution of a contract made by them with a railway company, in ballasting a siding near the company’s line of railway, was, while going to his work, killed by accident by a train upon the railway about 150 yards from the place where his work lay, and seven minutes before the time for the commencement of his work. The employers

had obtained the licence of the company for their workmen to go to the work by getting upon the railway at a certain gate, from which a footpath led by the side of the railway to the work without crossing the main line, or going upon it, several sidings intervening between the path and the main line, and they had instructed the workman to go to the work by this gate.

HELD (Romer, L.J., *diss.*)—that it was no part of the employers' contract with the workman that he should go to the work by the railway, and that the employers owed no duty to him while he was passing along the railway, over which they had no control; and that in the circumstances, as the workman had not at the time of the accident arrived at the place where his work lay, and as the time for the commencement of his work had not arrived, the accident did not arise out of and in the course of the workman's employment within the meaning of s. 1, sub-s. 1, of the Workmen's Compensation Act, 1897.

Notes.—*Brydon v. Stewart*, 2 Macq. H. L. 30 [3044], and *Tunney v. Midland Railway*, L. R. 1 C. P. 291 [3012], discussed.

A. L. Smith, L.J., stated the law to be as follows: "Here the appellants had no control over the railway premises except that part where the work under their contract was being actually performed, for the mere licence to use the premises to get to the locality of the work gave the contractors no right of control over the portion along which they passed or over the trains running thereon. The present case seems to me like the case of a man who meets with an accident while passing along a highway or any other way in order to get to his work. I do not think that it was part of the contract of employment that the employment should extend till the deceased got to the place where his work was, or rather should include the time taken in getting to that place, nor can I hold that he had in contemplation of law begun his work when he had not got to the place where his work lay and the time for commencing work had not arrived. It is true that the accident happened only seven minutes before his work was to commence; but if the shortness of the time is an element for our consideration, where is the line to be drawn? There can only be one line which can be safely drawn, one test which can be safely applied, and that is that unless the injury arises out of and in the course of the workman's employment, and happens on the locality where he is employed he does not come within the terms of this Act."

2092.—*Nolan v. Porter and Sons* (1909), 2 B. W. C. C. 106—C. A.

The employers, ship scalers, gave a workman a return ticket to the dock railway station, telling him to report himself on board a ship at 7 a.m. in the morning. The workman made use of the ticket. On arriving at the dock he mistook the position of the gangway, and falling between the dock wall and the ship was injured. His day's pay would have begun from the time he reported himself on board the ship. Neither dock, ship nor gangway were under the control of his employer. The county court judge on an arbitration between the workman and the employers under the Act, found that the giving of the return railway ticket was merely a gratuitous concession by

the employers, and that it was in no way obligatory on the workman to go or return from his work by train.

HELD—the accident did not arise out of and in course of his employment.

Notes.—*Per* Cozens-Hardy, M.R.: “The contention that the employment began when the workman left his home is clearly an extravagant proposition. . . . The man went by train, but instead of getting on board ship he made a mistake as to the position of the gangway and fell into the dock. At that time, in my opinion, his employment had not yet begun, so that the accident did not arise out of and in the course of his employment.”

2093.—**Walters v. Staveley Coal and Iron Co.** (1911), 105 L. T. 119; 55 S. J. 579; 4 B. W. C. C. 303—H. L.

The respondents allowed their workmen to use a short cut over land belonging to them on their way to and from their work, but there was no contract on the part of the employers to provide this mode of access to their works, and there was no obligation on the part of the workmen to use it. A workman fell while using this path on his way to work and was injured.

HELD—that the accident did not arise out of or in the course of the workman's employment within the meaning of the Workmen's Compensation Act, 1906.

2094.—**Holmes v. Great Northern Railway**, [1900] 2 Q. B. 409; 69 L. J. Q. B. 854; 83 L. T. 44; 48 W. R. 681; 64 J. P. 532; 16 T. L. R. 412—C. A.

A workman living near and usually employed at King's Cross was ordered to work four miles distant at an engine shed near Hornsey. He was carried by his employers free of charge to Hornsey every morning and back every evening. While on his way from Hornsey station to the shed, shortly before his day's work began, he was run over by a train and killed.

HELD—that the man's employment commenced at King's Cross and that the accident arose “out of and in the course of his employment” within the meaning of s. 1, sub-s. 1, of the Workmen's Compensation Act, 1897.

Notes.—The law applying to cases of this kind was stated by A. L. Smith, L. J., to be as follows: “It must be borne in mind that there is a difference between the beginning of a man's employment and the beginning of his work; for instance, in a coal pit the employment begins as soon as a miner leaves the bank, although he may have some distance to go to his actual work after he has got down the pit. In the present case I think there was satisfactory proof of an implied contract on the part of the appellants to take the deceased from King's Cross to Hornsey, there to find him work, and to take him back again when his day's work was over.”

2095.—*Cremins v. Guest, Keen and Nettlefolds*, [1908] 1 K. B. 469 ; 77 L. J. K. B. 326 ; 24 T. L. R. 189 ; 52 S. J. 146 ; 1 B. W. C. C. 160—C. A.

Where a claim for compensation is made under s. 1 of the Workmen's Compensation Act, 1906, it is still as necessary as before to establish that the accident arose not only "out of" but "in the course of" the employment.

A number of colliers lived about six miles from the colliery in which they were employed. A train, composed of carriages belonging to the employers, but driven by a railway company's men, conveyed free of charge the colliers from their home to a platform erected by the employers on land belonging to the railway company, and took them back again. The platform was under the control of the employers and was used exclusively by the colliers, who walked from there along a high road to the colliery, which was about a quarter of a mile away. A collier, whilst waiting on the platform for the return train, was knocked down in a rush for seats, and was killed by the train.

HELD—that it was an implied term of the contract of service that the trains should be provided by the employers, and that the colliers should have the right, if not the obligation, to travel to and fro without charge ; and that therefore the employment began when the colliers entered the train in the morning and ceased when they left the train in the evening, and the employers were liable ; but that it did not follow that every workman was entitled to the protection of the Act whenever an accident happened to him on his way from his home to his employer's place of business.

2096.—*Walton v. Tredegar Iron and Coal Co., Ltd.* (1913), 6 B. W. C. C. 592 ; [1913] W. C. & I. Rep. 457—C. A.

A collier, living six miles from the pit where he worked, travelled free of charge to and from his works on a train provided by a railway company at the instance of the employers. By an agreement the collier indemnified the employers against loss from accident on the journey, and agreed to desist from exercising the privilege of travelling by the train whenever his employers required him to do so. In getting into this train for the journey home the collier was killed by an accident.

HELD—that the accident arose out of and in the course of the employment.

Notes.—*Cremins v. Guest, Keen and Nettlefolds* [2095] followed.

2097.—*Mole v. Wadworth* (1913), 6 B. W. C. C. 129 ; [1913] W. C. & I. Rep. 160—C. A.

A workman, whose only method of getting to and from work was by means of a boat supplied by his employer, was drowned by falling from the boat as he was returning at the usual hour.

HELD—that the accident arose out of and in the course of the employment.

Notes.—*Cremins v. Guest, Keen and Nettlefolds* [2095] followed.

2098.—*Edwards v. Wingham Agricultural Implement Co.*, [1913] W. C. & I. Rep. 642; 82 L. J. K. B. 998; 109 L. T. 50; 57 S. J. 701; 6 B. W. C. C. 511—C. A.

A workman was employed at 6*d.* an hour to work his employers' threshing machines, and he had also to go about the district allotted to him looking after his employers' interests. As a term of his contract of service, he was provided with a bicycle for going to and from his work as well as for going from one part of his district to another in the course of his employment. When he was working at a distance from the employers' works he was not expected to return there at the end of the day, but ceased work each day at 6 p.m. On September 25th, 1912, the workman had been engaged in working a threshing machine some distance away and had stopped working at 6 p.m. Subsequently, whilst riding on the bicycle to his home, he was run into by a motor lorry and killed.

HELD—that the accident did not happen in the course of the workman's employment and that his dependants were not therefore entitled to compensation under the Workmen's Compensation Act, 1906.

Notes.—In his judgment Cozens-Hardy, M.R. said: "When does the employment of a man begin? Except in such a case as that of the domestic servant, where the employment is continuous, the employment must begin at some time and place, and end at some time and place. Here the employment ended at six o'clock. The man was under no obligation to his employer to move away from that place after six o'clock, and to ride home on the bicycle. I cannot see what importance should be attached to the fact that he was on that bicycle at the time the accident happened. If the accident had happened in going from one place to another during his work, I assume that the workman could have recovered—that is, I assume, without deciding, that in such a case the accident would have arisen not only in the course of, but also out of, the employment. In my opinion the applicant in this case fails, because the accident did not arise in the course of the employment." *Cremens v. Guest, Keen and Nettlefolds* [2095] and *Mole v. Wadworth* [2097] discussed. *Nolan v. Porter* [2092] referred to.

2099.—*Gane v. Norton Hill Colliery Co.*, [1909] 2 K. B. 539; 78 L. J. K. B. 921; 100 L. T. 979; 25 T. L. R. 640; 2 B. W. C. C. 42—C. A.

A collier leaving his employers' premises crossed a line of rails under the control of the employers on which trucks were standing at the time. As he was passing under or between the trucks they were suddenly set in motion, and he was injured. He might have gone round another way by a bridge, but in crossing the line of railway he was taking the route which he had always taken, and one which was recognised by the employers.

HELD—that the accident arose out of and in the course of his employment.

Notes.—In his judgment Cozens-Hardy, M.R., said: "I am

clearly of opinion that it is open to us in a case like this, where the facts are not in dispute, where they have all been found by the tribunal dealing with the facts, to say that the inference which the judge drew from those facts and the conclusion at which he arrived on those facts are wrong in point of law." *Cremins v. Guest, Keen and Nettlefolds* [2095]; *Holmes v. Great Northern Railway* [2094] followed.

2100.—*Benson v. Lancashire and Yorkshire Railway*, [1904] 1 K. B. 242; 73 L. J. K. B. 122; 89 L. T. 715; 52 W. R. 243; 68 J. P. 149; 20 T. L. R. 139—C. A.

An engine driver was required to be on duty at an engine shed each morning at 7.45 a.m. To reach the engine shed his usual and proper mode of access to the railway company's premises was by a gate, from which a path led direct to the engine shed without involving crossing the rails. On the morning of the accident he left his house considerably earlier than was necessary, so far as his duties were concerned; and when he reached the gate referred to, instead of turning to the left and going direct to the engine shed, he went in the opposite direction to a signal-box standing in the middle of the lines of rails, in order, for his own purposes, to make certain enquiries of the signalman. Having made these enquiries, he left the signal-box and went in the direction of the engine shed, and in crossing the rails he was fatally injured.

HELD—that the accident did not arise out of and in the course of his employment, and that therefore the company were not liable to pay compensation to his dependants.

Notes.—In this case Collins, M.R., said: "He had not entered on his employment, merely because he had got upon his employers' premises. A railway extends a long way, and a workman employed by the company does not enter upon his employment at any place where on any given morning he chooses to enter on their premises with a view of subsequently going to his work."

2101.—*Hoskins v. Lancaster* (1910), 26 T. L. R. 612; 3 B. W. C. C. 476—C. A.

The applicant, a collier, who was employed at the respondents' colliery, in order to get to his work had to pass through an iron gate which was on the respondents' premises, and which was 100 yards from the lamp room where the applicant had first to go. While the applicant was passing through the iron gate it slammed and caught and injured him.

HELD—that the accident arose out of and in the course of the applicant's employment, and that he was entitled to compensation under the Workmen's Compensation Act, 1906.

Per Cozens-Hardy, M.R.: Each case must depend upon its own facts as to the reasonable interval of time and space during which a workman's employment lasts. It must not be taken that the protection of the Act extends to workmen on any part of the employers' property.

Notes.—The following cases were referred to by Cozens-Hardy, M.R.: *Sharp v. Johnson & Co.* [2103], *Gane v. Norton Hill Colliery Co.*, [2099], and the unreported case of *Cross, Tetley & Co. v. Catterall* [2104], which appears to have decided that “the moment at which the actual work of the workman begins cannot be taken as the true moment of the commencement of his employment for the purposes of the Act.”

2102.—*Williams v. Assheton Smith*, [1913] W. C. & I. Rep. 146 108 L. T. 200; 6 B. W. C. C. 101—C. A.

The circumstance that the soil of a footpath which a workman used as a member of the public was vested in his employer was held not to render an injury that he sustained through slipping and falling while passing along the footpath on his way to his employment an “injury by accident arising out of and in the course of” his employment within the meaning of s. 1 of the Workmen’s Compensation Act, 1906, so as to entitle him to compensation under that Act.

Notes.—*Hoskins v. Lancaster* [2101] and *Cremins v. Guest, Keen, and Nettlefolds* [2095] explained and applied.

2103.—*Sharp v. Johnson & Co.*, [1905] 2 K. B. 139; 74 L. J. K. B. 566; 92 L. T. 675; 53 W. R. 597; 21 T. L. R. 482—C. A.

A workman, in accordance with his usual practice, arrived on his employers’ premises about twenty minutes before the time for actually beginning work, the train by which he travelled each morning—the only practicable one—taking him thus early to his destination. In giving up his time ticket immediately after arrival to a night watchman, who said he would deposit it for him at the proper place, the workman sustained injuries by falling into a hole. To the knowledge of the foreman, a number of the workmen arrived equally early and spent the time till the moment for beginning work in a mess cabin on the premises, which was provided by the employers.

HELD—that the accident arose out of and in the course of the workman’s employment.

Notes.—The unreported case of *Cross, Tetley & Co. v. Catterall* [2104], which appears to have decided that “the moment at which the actual work of the workman begins cannot be taken as the true moment of the commencement of his employment for the purposes of the Act,” followed. Collins, M.R., in this case said: “A reasonable margin must be allowed to the workman for the purpose of getting to the part of the premises where his actual work is to be carried on . . . It clearly appears to have been decided . . . in the House of Lords, that the moment at which the actual work of the workman begins cannot be taken as the true moment of the commencement of his employment for the purposes of the Act.”

2104.—*Cross, Tetley & Co. v. Catterall*, unreported.

See note to *Sharp v. Johnson & Co.* [2103].

2105.—Fitzpa'rick v. Hindley Field Colliery Co. (1901), 4 W. C. C. 7—C. A.

A miner's employment has commenced when he has obtained his pit lamp and his "tallies," and is waiting at the pit brow to descend.

Notes.—*Per* Collins, M.R. : " I should suggest that there must be a certain margin of unpunctuality allowed, and if he is on the premises before he has to do his work, and during that time the accident arises, it arises out of and in the course of his employment."

2106.—Mackenzie v. Coltness Iron Co. (1903), 6 F. 8; 41 Sc. L. R. 6—Ct. of Sess.

A miner, while proceeding above ground to his work, slipped and broke his leg upon rails belonging to the mine leading to the doorway of a horizontal passage by which the mine was entered, at a spot distant between nine and thirteen feet from the doorway.

HELD—that the accident arose out of and in the course of the workman's employment.

Notes.—*Todd v. Caledonian Railway Co.*, 1 F. 1047 [2187] followed.

2107.—Anderson v. Fife Coal Co., [1910] S. C. 8; 47 Sc. L. R. 3; 3 B. W. C. C. 539—Ct. of Sess.

A workman employed at a coal mine, while going from his house to his work by the usual road, and while crossing a railway belonging to his employers, fell and was injured. The place of the accident was part of the mine within the meaning of the Coal Mines Regulation Act, 1887, and the workman might have been required to work there under his contract of service. In point of fact, his only duties at the time were those of a miner underground, and did not actually commence until he arrived at the lamp cabin, 360 yards distant from the scene of the accident.

HELD—that the accident did not arise out of and in the course of the workman's employment within the meaning of the Workmen's Compensation Act, 1906.

2108.—Kearon v. Kearon (1911), 45 I. L. T. 96; 4 B. W. C. C. 435—C. A. (Ir.).

A seaman when off duty left his vessel on his own business. The vessel was then alongside the quay, but on his return two hours afterwards it was some five or six feet from the pier, the top of the rail being about three feet lower than the quay. The vessel had no gangway, but a ladder was used for getting on board. On his arrival at the pier the seaman, seeing no ladder, hailed, and having got no answer he jumped from the pier to the vessel, with the result that his leg struck against the rail and was permanently injured.

HELD (reversing the county court judge)—that the accident arose out of and in the course of the employment.

Notes.—*Robertson v. Allen*, 98 L. T. 821 [1963], followed.

2109.—Cook v. S.S. Montreal (Owners), [1913] W. C. & I. Rep. 206 ; 108 L. T. 164 ; 57 S. J. 282 ; 29 T. L. R. 233 ; 6 B. W. C. C. 220—C. A.

A sailor, whose engagement on a ship was completed, was leaving the ship by means of a ladder to get on to a dolphin which was a floating stage belonging to the Port Authority. He got on to the dolphin, but before he could reach the bridge connecting the dolphin with the quay he fell and was killed. In a claim for compensation by his widow, the county court judge held that the deceased's employment ceased when he arrived on board the dolphin owned by the Port Authority, and therefore that the applicant was not entitled to compensation. The applicant appealed.

HELD (dismissing the appeal)—that the employers' liability ceased when the deceased reached the dolphin, which was part of the dock premises.

Notes.—*Gane v. Norton Hill Colliery Co.* [2099] distinguished.

2110.—M'Kee v. Great Northern Railway (1908), 42 Ir. L. T. 132 ; 1 B. W. C. C. 165—C. A. (Ir.).

The mere fact that a workman at the time the accident occurs is leaving his employers' works by a way other than that usually used does not preclude an arbitrator from finding that the accident arose out of and in the course of the employment within the meaning of s. 1, sub-s. 1, of the Act.

2111.—Hendry v. United Collieries, Ltd., [1910] S. C. 709 ; 47 Sc. L. R. 635 ; 3 B. W. C. C. 567—Ct. of Sess.

A miner on leaving the pit after his work was finished, instead of taking the recognised road from the mine provided by the mine owners, crossed over a gangway to a dirt bing, down which he proceeded by a steep and very rough track. This track was not formed in any way, but was worn down into uneven steps, and, although it was occasionally used by men who were pressed for time, there was no evidence that the mine owners knew of this, and the use of the track was neither sanctioned nor prohibited by them. While walking down the track the miner fell and received fatal injuries. In a claim for compensation by the miner's dependants, the arbitrator found that the accident did not arise out of and in the course of the deceased's employment.

HELD—that the arbitrator's finding was, on the evidence, not unreasonable, and therefore could not be set aside.

2112.—Kelly v. Owners of Ship Foam Queen (1910), 3 B. W. C. C. 113—C. A.

A ship's fireman left his ship lying in the Thames on a Sunday, and went to his son's house, where he slept the night. Early next morning he made his way back towards his ship. On reaching the public quay, he hailed a waterman, but on descending the steps slipped, fell, and was injured.

HELD—that the accident did not arise out of and in the course of his employment.

2113.—Gibson v. Wilson (1901), 3 F. 661; 38 Sc. L. R. 450—Ct. of Sess.

A workman employed in the renovation of the interior of a church found the church door locked on his arrival in the morning, and was unable to unlock the door. To gain access to his work he climbed the iron railing of a neighbouring schoolyard, which enabled him to scale the churchyard wall and enter the church by a window. The railing was topped by spikes, one of which pierced his foot, from the effects of which injury he died.

HELD (Lord Moncrieff *dubitante*)—that the accident did not arise “out of and in the course of the employment” of the workman in the sense of s. 1, sub-s. 1, of the Workmen's Compensation Act, 1897.

2114.—Davies v. Rhymney Iron Co. (1900), 16 T. L. R. 329—C. A.

A colliery company owned a short line of railway, by which they brought their colliers from their work to their homes. The company were not bound to carry the men, who did not pay for the use of the train and might use it or not as they pleased. On going home by the train a collier fell while alighting therefrom and was injured.

HELD—that the accident did not arise out of and in the course of his employment.

2115.—Caton v. Summerlee and Mossend Iron and Steel Co., Ltd. (1902), 4 F. 989; 39 Sc. L. R. 762—Ct. of Sess.

A workman employed at a coal mine had finished his day's work, and was proceeding home along a private line of railway occupied by the colliery, when he was run over and killed at a point 230 yards distant from the place where he worked.

HELD (Lord Young *diss.*)—that the accident did not arise out of and in the course of his employment in the sense of s. 1, sub-s. 1, of the Workmen's Compensation Act, 1897.

Notes.—*Gibson v. Wilson* [2113] applied.

2116.—Graham v. Barr and Thornton, [1913] S. C. 538; [1913] W. C. & I. Rep. 202; 6 B. W. C. C. 412—Ct. of Sess.

A workman, employed underground in a coal mine, on finishing his day's work returned to the surface and was proceeding home by a track along the side of a private branch railway line, the property of his employers, when he was knocked down and killed by an engine at a point four hundred yards distant from the mouth of the pit.

HELD—that the accident did not arise out of and in the course of his employment.

Notes.—*Caton v. Summerlee and Mossend Iron and Steel Co., Ltd.* [2115] followed.

2117.—Whitbread v. Arnold (1908), 99 L. T. 108—C. A.

A shepherd newly engaged by a farmer was killed by falling from a waggon which had been sent by the farmer to the shepherd's home, situate several miles from the farm, for the purpose of conveying him with his family and furniture to the cottage that he was to occupy during his employment.

HELD—that, although there was a contract of service between the farmer and the shepherd, the employment of the latter did not commence when he left his home in the waggon belonging to the farmer, but would have commenced at the earliest period of time when he would have entered on his duties as a shepherd if he had not met with the accident which caused his death, and that therefore the accident did not arise “out of and in the course of the employment” of the deceased.

2118.—Perry v. Anglo-American Decorating Co. (1910), 8 B. W. C. C. 310—C. A.

A workman was engaged to load a van, and was promised employment in unloading it at another place if he would be there by the time the van arrived. He agreed to be there, and started on his bicycle, but on the way met with an accident.

HELD—that there were two separate and distinct employments, that one had ended and the other had not begun, and therefore that the accident did not arise out of and in the course of his employment.

2119.—Haley v. United Collieries, [1907] S. C. 214; 44 Sc. L. R. 193—Ct. of Sess.

A workman employed at a coal mine, proposing to go home by crossing a railway siding on the premises of the mine owners, and by trespassing along a railway, was injured while crossing the siding. There were two exits provided for leaving the mine, neither of which crossed the siding. The workman was aware that the short cut was not the proper exit, but there was no express prohibition against workmen leaving the mine at this spot.

HELD—that the accident did not arise out of and in the course of the workman's employment.

Notes.—*Gibson v. Wilson* [2113]; *Caton v. Summerlee and Mossend Iron and Steel Co., Ltd.* [2115], cited.

2120.—Guilfoyle v. Fennessy (1913), 47 Ir. L. T. 19; 6 B. W. C. C. 453; [1913] W. C. & I. Rep. 228—C. A. (Ir.).

A workman was employed by a farmer occupying two holdings separated by a river. A boat was kept for the purpose of enabling the farm hands to cross from one farm to the other. One evening, the boat not being available, the workman, acting in the course of his employment, apparently attempted, contrary to the advice of his employer, to cross the river by swimming, and was subsequently found drowned.

HELD—that the deceased, having crossed the river by swimming, had exposed himself to a new and added peril not incidental to the employment or contemplated by the parties, and that therefore the accident did not arise out of the employment.

Notes.—*Haley v. United Collieries* [2119] applied. *M'Kee v. Great Northern Railway* [2110] referred to.

2121.—*Gilmour v. Dorman, Long & Co.* (1911), 105 L. T. 54; 4 B. W. C. C. 279—C. A.

A workman was accustomed to go to the works where he was employed by a footpath which ran over vacant land belonging to his employers, and afterwards alone a railway line. While on his way to work he was injured by slipping on some ice on the footpath over the vacant land, a quarter of a mile from the place where he had to work.

HELD—that the accident did not arise out of and in the course of the employment.

Notes.—In this case Cozens-Hardy, M.R., said: "A man is not entitled to the protection of the Act when on his way from his home to the works. . . . Generally speaking, the factory gate or yard indicates the boundary. Sometimes there may be a sort of excrescence."

III. *Accidents during Dinner Hours and other Breaks in Employment.*

2122.—*Blovelt v. Sawyer*, [1904] 1 K. B. 271; 73 L. J. K. B. 155; 89 L. T. 658; 52 W. R. 503; 68 J. P. 110; 20 T. L. R. 105—C. A.

A workman was paid by the hour for the number of hours he was actually at work, the daily dinner-hour being excluded from the calculation, and the wages paid weekly. During the dinner-hour the workman was at liberty either to leave the employer's premises or to remain upon them and take his dinner there. The workman was injured by an accident after he had sat down on the premises to eat his dinner. In an arbitration under the Workmen's Compensation Act, 1897, the county court judge held that, as the workman had sat down for the purpose of eating his dinner, the accident did not arise "out of and in the course of the employment."

HELD—that the fact that the workman was not actually paid for and was not obliged to remain on the employer's premises during the dinner-hour did not necessarily take the case out of the Act, and that he was entitled to claim compensation.

Notes.—Collins, M.R., in his judgment in this case said: "It seems to me, that notwithstanding what is alleged as to the payment being for the hours in which the applicant was actually engaged in work and not for the time in which he took his meals, we must take a broader view, and treat him as continuing in the employment of the master by the consent of the master, insomuch as it is for the

master's advantage that the workmen should have an opportunity to feed themselves."

2123.—Rowland v. Wright, [1909] 1 K. B. 963 ; 77 L. J. K. B. 1071 ; 99 L. T. 758 ; 24 T. L. R. 852 ; 1 B. W. C. C. 192—C. A.

A teamster in the course of his employment was taking his meal in the stable, when one of the stable cats flew at and bit him, the bite resulting in serious injury.

HELD—that the accident arose out of and in the course of his employment, and that he was entitled to compensation for the injury.

2124.—Morris v. Lambeth Borough Council (1905), 22 T. L. R. 22—C. A.

The applicant was a watchman in the employment of a borough council, and was employed to watch at night some sewer work, his duty being to look after tools and traffic lamps and to prevent accidents. There was a watch-box for him to sit in. The tools were kept in a shanty which was constructed of scaffold poles, trestles, planks, and a tarpaulin. Upon the night in question there was a fire outside the watch-box, but as it was raining the applicant lighted a fire in the shanty and proceeded to cook his food there. While so engaged the shanty fell down and injured him. The evidence showed that the workmen were in the habit of having their food in the shanty in the daytime, and there was no evidence that the applicant was expressly prohibited from making use of the shanty, though the borough engineer gave evidence that the applicant had no business in the shanty at all, and that he would discharge a watchman if he had a fire in the shanty at night. In proceedings to assess compensation under the Workmen's Compensation Act, 1897, the county court judge found that the applicant was not properly in the shanty, having regard to his duties, and that therefore the accident did not arise out of the employment.

HELD—that, in the absence of a prohibition against the applicant using the shanty, the evidence showed that the accident arose out of and in the course of the employment, and the Act applied.

2125.—Keenan v. Flemington Coal Co. (1902), 5 F. 164 ; 40 Sc. L. R. 144—Ct. of Sess.

A miner left the pithead, where he was working, to get a drink of water, and was killed by a runaway hutch when he was returning.

HELD—that he was killed "in the course of his employment" within the meaning of the Act.

Notes.—See *Brice v. Edward Lloyd, Ltd.* [2046].

2126.—Heywood v. Broadstone Spinning Mill (1910), 128 L. T. J. 134—County Court.

The applicant, who worked at a mill in a room with a temperature of ninety degrees, was injured by the bursting of a glass bottle

containing herb beer which he was in the act of drinking during his employment. It was proved that the employees in that mill were allowed to bring to their work liquid refreshment, which they took from time to time to quench their thirst whilst following their employment, and such a custom was recognised throughout the mills in Lancashire.

HELD (by his Honour Judge Reginald Brown, K.C.)—that the accident arose out of the man's employment.

2127.—McKrell v. Howard and Jones (1909), 2 B. W. C. C. 460—City of London Court.

A law writer was injured in the street during the hour allowed for lunch.

HELD—a law writer is within the Act, but the luncheon hour is not part of his period of employment.

2128.—Aldridge v. Merry, [1913] 2 Ir. R. 308; 47 Ir. L. T. 5; 6 B. W. C. C. 450; [1913] W. C. & I. Rep. 97—C. A.

A domestic servant, employed in a private hotel, was called by her mistress at six o'clock in the morning to light the fire in the kitchen range. While in the act of getting up to do so, some mortar from the rendering attached to the slates fell into her right eye, in consequence of which she lost the sight of that eye. Handfuls of mortar had often before fallen from the slates above the servant's sleeping room to the knowledge of her employer.

HELD—that the accident arose out of and in the course of the employment.

Notes.—*Per* Cherry, L.J.: "The employment of a domestic servant is continuous, as she is bound at any time, day or night, to answer and obey the orders of her mistress. In cases of sickness her attendance may be required at night. Thus any accident that befalls her on the employer's premises must arise 'in the course of' her employment." *Blovelt v. Sawyer* [2122]; *Morris v. Lambeth Borough Council* [2124], followed.

As to the position of domestic servants, see also the note to *Edwards v. Wingham Agricultural Implement Co.* [2098].

2129.—Thomson v. Flemington Coal Co., Ltd., [1911] S. C. 823; 48 Sc. L. R. 740; 4 B. W. C. C. 406—Ct. of Sess.

A workman while on duty attending to boilers at a colliery left his work for a necessary purpose, and instead of going to the nearest w.c. went into a confined space underneath a table engine, where he accidentally plunged his foot into boiling water in a cistern, which, sunk in the ground underneath the engine, was used to receive the escape hot water from the engine.

HELD—that the accident did not arise out of and in the course of the employment within the meaning of s. 1, sub-s. 1, of the Workmen's Compensation Act, 1906.

2130.—Rose v. Morrison and Mason, Ltd. (1911), 105 L. T. 2; 80 L. J. K. B. 1103; 4 B. W. C. C. 277—C. A.

A workman who was proceeding with others under orders from one part of the works to another stopped, saying that he was going to ease himself. He was found dead in a hoist where it was unreasonable for him to go, and where he could not have gone by accident.

HELD—that the accident did not arise out of the employment.

2131.—Cogdon v. Sunderland Gas Co. (1907), 1 B. W. C. C. 156—County Court.

A workman employed by the Sunderland Gas Co., when repairing a gas pipe in a private house, asked leave of his chargeman to go to a place of convenience. Leave being given, the workman went to the house of his father-in-law three streets (about 214 yards) away from the house in which he was working. On entering the house he fell into a hole in the floor and was injured.

HELD—that the accident did not arise out of and in the course of the employment.

IV. *Accidents arising after Termination of the Employment.*

2132.—Riley v. W. Holland & Sons, Ltd., [1911] 1 K. B. 1029; 80 L. J. K. B. 814; 104 L. T. 371; 27 T. L. R. 327; 4 B. W. C. C. 155—C. A.

The applicant, who had been working in the respondents' mill, was told on Wednesday, July 6th, 1910, that there was no more work for her, and she then left. She returned to the mill on Friday, July 8th, in order to get the wages due to her up to the Wednesday; it being the practice of the respondents to pay wages each Friday up to the preceding Wednesday. While returning from the pay office in the mill on the Friday she met with an accident, in respect of which she claimed compensation under the Workmen's Compensation Act, 1906.

HELD (Buckley, L.J., *diss.*)—that the contractual obligations of the respondents were not terminated or satisfied until the wages due on the Wednesday were paid on the Friday; that it was the applicant's duty to go to the mill on the Friday to receive her wages; that her employment, although in a sense it came to an end on the Wednesday, continued till the Friday because of the obligations of the respondents arising out of and in the course of the employment; and, therefore, that the accident arose out of and in the course of the applicant's employment.

Per Cozens-Hardy, M.R.: The general principle that a debtor ought to go to his creditor and pay him has no application to large employers of labour who have a regular pay day and a regular pay office.

Notes.—*Lowry v. Sheffield Coal Co.* [2133] followed. *Brydon v. Stewart* (1855), 2 Macq. 30, at p. 35 [3044]; *Holness v. Mackay*, [1899] 2 Q. B. 319, at p. 326 [2091], referred to. The following cases were

referred to in the dissentient judgment of Buckley. L.J. : *Cowler v. Moresby Coal Co., Ltd.*, 1 T. L. R. 575 ; *Molloy v. South Wales Anthracite Colliery Co.* [2135] ; *Nelson v. Belfast Corporation* [2134].

2133.—*Lowry v. Sheffield Coal Co.* (1907), 24 T. L. R. 142 : 1 B. W. C. C. 1—C. A.

The appellant was employed as a collier by the respondents, and it was part of his contract of employment that the employers should pay him his wages at their pay office. The appellant left work on Saturday at 5 a.m. At 12.30 p.m. he was going for his wages along a path which had been made by the respondents for their workmen, and while going along a railway company's line which ran through the respondents' premises he was knocked down by an engine and injured.

HELD—that he was injured “in the course of the employment” within s. 1, sub-s. 1, of the Workmen's Compensation Act, 1897, and was entitled to compensation.

2134.—*Nelson v. Belfast Corporation* (1908), 42 Ir. L. T. 223 ; 1 B. W. C. C. 158—C. A. (Ir.).

A workman engaged as a corporation labourer on the public roads was required to go for his pay to the tramway depôt, situated in a public road, some distance away. The workman was paid for the time occupied in going to and returning from the pay place. When returning to his work after receiving his wages from the depôt, he mounted a tramcar, but finding that it did not travel to the place where his work was situated, he got off, and was struck by a passing cart and injured.

HELD (reversing the decision of the Recorder of Belfast)—that the injury, under the circumstances, was one arising out of and in the course of the employment.

2135.—*Molloy v. South Wales Anthracite Colliery Co.* (1910), 4 B. W. C. C. 65—C. A.

A collier, a few days after leaving his work, obtained leave to go down into the mine to bring up his tools, and while there for that purpose met with an accident.

The county court judge, in a considered judgment, found that the accident “arose out of and in the course of” the man's employment with the colliery owners, and awarded him compensation.

The colliery owners appealed on the ground that the judge had misconceived the facts. Although his finding of fact was that the man was ordered by the manager to fetch his tools, the judge ought to have found on the evidence that he had ceased to be their servant, and had met with the accident while in the mine on his own business. They asked that the case should be remitted.

HELD—that the employers' request must be refused, as this court had no jurisdiction to interfere with the finding of fact.

2136.—Phillips v. Williams (1911), 4 B. W. C. C. 143—C. A.

A collier received his pay-note on a Saturday. Being dissatisfied with the amount, he spoke to the manager, who referred him to the under manager. The latter could not be seen till Monday. The collier came on Monday at mid-day, not intending to resume work unless the dispute was settled in his favour, and saw the under manager, who did not give in. The collier then proceeded to leave but was knocked down by a coal waggon and killed.

HELD—that the county court judge was justified in finding that the accident arose neither out of nor in the course of the employment.

Notes.—*Gane v. Norton Hill Colliery Co.*, [1909] 2 K. B. 539 [2099], distinguished on the ground that it was a case in which a man was going home from work, while in the above case he came to settle a dispute with no intention of working. *Lowry v. Sheffield Coal Co., Ltd.* [2133] referred to.

2137.—Dickinson v. Barmack, Ltd. (1908), 124 L. T. J. 403—C. A.

Although there may be cases where the employment of a workman ceases as soon as he leaves his work, a commercial traveller is on a different footing, his business being to travel. From the time when he leaves his home on his employers' business until he returns to his home he is serving in the employment of his employers.

2138.—Poulton v. Kelsall, [1912] 2 K. B. 131; 81 L. J. K. B. 774; 106 L. T. 522; 28 T. L. R. 329; 5 B. W. C. C. 318; [1912] W. C. Rep. 231—C. A.

A workman employed as a storekeeper in Manchester acted as carter for his employer at a time when the carters at Manchester were on strike, under a special contract by which the employer agreed to be responsible for any injury which he might sustain. He was on his way home from work and was passing through a market place about seven minutes' walk from his employer's premises, when he was attacked by strikers and seriously injured.

HELD—that the agreement, while enlarging the liability of the employer, could not bring within the operation of the Workmen's Compensation Act, 1906, an accident which was not in the course of the workman's employment, and that an award of compensation under the Act could not be maintained.

Notes.—See *Murray v. Denholme & Co.* [1890].

“INJURY FOR A PERIOD OF AT LEAST ONE WEEK.”

Sect. 1, sub-s. (2). “Provided that:—

“(a) The employer shall not be liable under this Act respect in of any injury which does not disable the workman for a period of at least one week from earning full wages at the work at which he was employed:”

N.B.—See also Schedule I. (i.) (b), proviso (a), which provides “that if the incapacity lasts less than two weeks no compensation shall be payable in respect of the first week.”

2139.—Chandler v. Smith, [1899] 2 Q. B. 506 ; 68 L. J. Q. B. 909 ; 81 L. T. 317 ; 47 W. R. 677 ; 15 T. L. R. 480—C. A.

The mere fact that a workman who had been injured by an accident arising out of and in the course of his employment is paid by his employer the same wages after as he received before the accident happened, does not conclusively show that he has not been disabled for a period of at least two weeks from earning full wages at the work at which he was employed within s. 1, sub-s. 2 (a), of the Workmen’s Compensation Act, 1897, inasmuch as part of the wages so paid may not have been earned by him, but may have been paid to him by his employer as a matter of grace.

Notes.—The meaning of the sub-section was explained by the Lords Justices as follows:—

Per A. L. Smith, L.J.: “The meaning of this sub-section is well exemplified by the maxim ‘*De minimis non curat lex.*’ If the master out of feelings of compassion and generosity, which happily is often the case, continues to pay the full wages though not under any legal obligation to do so, that does not bring the case within the sub-section.”

Per Rigby, L.J.: “In my opinion the disability referred to in s. 1, sub-s. 2 (a), of the Act cannot depend upon the greater or smaller liberality of the employer ; it must be a physical disability, and must depend upon the question whether the workman is capable of performing the work at which he was employed at the time of the accident as efficiently as he did before. In a case like the present, where a substantial part of the work cannot be done at all, the exception introduced by s. 1, sub-s. 2 (a), does not apply.”

It is necessary to remember that by the Act of 1897, under which the above cases were decided, the period was two weeks. By the Act of 1906 the period is one week.

OPTION OF WORKMAN TO PROCEED INDEPENDENTLY OF ACT.

Sect. 1, sub-s. (2) (b) : " When the injury was caused by the personal negligence or wilful act of the employer, or of some person for whose act or default the employer is responsible, nothing in this Act shall affect any civil liability of the employer, but in that case the workman may, at his option, either claim compensation under this Act, or take proceedings independently of this Act ; but the employer shall not be liable to pay compensation for injury to a workman by accident arising out of and in the course of the employment both independently of and also under this Act, and shall not be liable to any proceedings independently of this Act, except in case of such personal negligence or wilful act as aforesaid."

The effect of this clause of the sub-section is to give to the workman an option of proceeding against his employer under the Act, or of exercising his right to commence proceedings at common law or under the Employers' Liability Act, 1880. These remedies are merely alternative, and thus if the workman brings an action for damages and fails, he cannot then, though still in time, commence proceedings under the Act. His only remedy in such a case is to avail himself of the exception contained in s. 1, sub-s. 4, and apply thereunder for the assessment of compensation (*Cribb v. Kynochs* (No. 2) [2140] ; *Edwards v. Godfrey* [2141]). If the workman, upon the dismissal of an action, makes an application under the Act, and is awarded compensation, he will not be entitled to proceed further with the action by way of appeal (*Neale v. Electric and Ordnance Accessories Co., Ltd.* [2142] ; but compare *Isaacson v. New Grand, Ltd.* [2143] ; and see also *Ryan or Little v. MacLellan* [2144] on this point). The rights of the dependants are independent of and not derivative from the rights of a deceased workman, and thus they may claim under the Act, although the workman had accepted a settlement for any claims he might have independently of the Act (*Howell v. Bradford & Co.* [2146]).

If a workman who has a right to make a claim under the Act prosecutes such claim to a decision and fails, he cannot then proceed by action against his employer (*Burton v. Chapel Coal Co., Ltd.* [2147]), and apparently the same rule applies if a workman, knowing that he has an option, accepts compensation under the Act (*Mackay v. Rosie* (No. 1) [2154] ; see also *Mehaffey v. Collen Brothers* [2148]). But it would appear that if a workman who has no right to proceed under the Act takes, by mistake, proceedings under the Act, he does not thereby deprive himself of his remedies independently of the Act (*Rouse v. Dixon* [2149] ; *Beckley v. Scott* [2150] ; *Blain v. Greenock Foundry Co.* [2151] ; *M'Donald v. Dunlop & Co.* [2152]). If a workman who has joined a scheme duly certified under the Act, is

killed by accident, his personal representatives will not be entitled to bring an action independently of the Act (*Taylor v. Hamstead Colliery Co.* [2153]), for where the workman has elected to proceed under the Act, he will be barred from maintaining an action (*Mackay v. Rosie* (No. 1) [2154]); but the *onus* is upon the employer to prove such election (*Fowler v. Hughes* [2155]; *Valenti v. Dixon* [2156]). A workman who has received compensation under the Act cannot claim wages for the period of his incapacity (*Elliott v. Liggins* [2157]), but he may sue on a contract of service for a special allowance to which he is entitled under such contract (*Simmonds v. Stourbridge Brick and Fire Clay Co., Ltd.* [2158]). If the employer pays compensation to a dependant under the Act, he will not be liable to pay compensation to another dependant independently of the Act (*Codling v. John Mowlem & Co., Ltd.* [2159]).

An infant who has exercised his option of claiming under the Act will not be precluded from maintaining an action, there being nothing in the Act forming an exception to the rule that an infant is not bound by a contract made by him which is not for his benefit (*Stephens v. Dudbridge Ironworks Co.* [2160]). As to the position of an infant in Scotland, see *M'Feetridge v. Stewarts and Lloyds* [2162].

2140.—Cribb v. Kynochs, Ltd. (No. 2), [1908] 2 K. B. 551; 77 L. J. K. B. 1001; 99 L. T. 216; 24 T. L. R. 736; 52 S. J. 581; 1 B. W. C. C. 43—C. A.

There is only one exception to the rule that an injured workman cannot make a claim both at common law and under the Workmen's Compensation Act: *i.e.*, when a fruitless common law action has been commenced within six months of his accident—in such a case he may ask to have compensation assessed under the Act.

A workgirl under twenty-one years of age, who was injured by an accident, gave notice of the accident within six calendar months under the Workmen's Compensation Act, 1897. More than a year after the accident she brought an action against the employer at common law to recover damages for the injuries caused by the accident. In this action judgment was given for the employer. She then applied to the county court for assessment of compensation under the Act.

HELD—that having elected to proceed at common law, but not having commenced her action within six months, she was not entitled to compensation under the Act.

Notes.—In this case the construction of s. 1, sub-s. 2 (b), and sub-s. 4, were considered together. *Edwards v. Godfrey* [2141] applied. Decision of the majority of the court in *Beckley v. Scott*. [2150] disapproved. *Rouse v. Dixon* [2149] discussed. *Taylor v. Hamstead Colliery Co.* [2153]; *Neale v. Electric and Ordnance Accessories Co., Ltd.* [2142]; *Stephens v. Dudbridge Ironworks Co.*, [2160] referred to.

Cozens-Hardy, M.R., in explaining this portion of the Act said: "I think that the true meaning of the Act is that a workman cannot proceed to trial under the Act and fail, and then proceed by common law action; and also cannot proceed by common law action, and having failed in that action then proceed under the Act.

"The single exception is contained in sub-s. 4 of s. 1, and it strongly confirms that view and seems to me to negative any wider or inconsistent right. . . . As regards that sub-section two points are clear. In the first place it has no application except when proceedings based on the common law liability of an employer have been commenced within six months from the occurrence of the accident; and secondly, the right given to the workman in that case is hedged in and guarded by the provision in favour of the employer that the costs of the action may be deducted from the compensation. . . . In my opinion the true view of the Act is, that when a workman who has failed in proceedings against his employer, based on the employer's common law liability, has brought his action within six months, in that case, and in that case only, is a remedy given to the workman under the Workmen's Compensation Act."

2141.—Edwards v. Godfrey, [1899] 2 Q. B. 333; 68 L. J. Q. B. 666; 80 L. T. 672; 47 W. R. 551; 15 T. L. R. 365—C. A.

A workman who has exercised his option under s. 1, sub-s. 2 (b) of the Workmen's Compensation Act, 1897, and brought an action

under the Employers' Liability Act, 1880, to recover damages for injury happening in the course of his employment, is not entitled, when he has failed in such action, to take proceedings under the Act of 1897, where he has not applied in that action for compensation to be assessed under s. 1, sub-s. 4, of the Act of 1897.

Notes.—A. L. Smith, L.J., in his judgment said: "As I read s. 1, sub-s. 2 (b), it gives to the workman, in cases where he would previously have had a right of action, an option, which he may exercise as he likes, of bringing an action at common law, or of resorting to the procedure for the assessment of compensation given by the Act itself; this seems to me to be the clear meaning of the sub-section. The respondent has availed himself of the right given him by that sub-section; he has exercised his option in favour of bringing a common law action, which has failed. Having been defeated in this action, there would, but for the provisions of s. 1, sub-s. 4, have been an end of any claim by the respondent against the appellant in respect of the injury. That sub-section, however, is in favour of the workman, and gives him a very great advantage where he has exercised his option, and finds too late that he has exercised it in the wrong way; it gives him a *locus pœnitentiæ*, and enables the county court judge before whom the action is tried, if applied to by the plaintiff at the time, to assess compensation under the Act." This view of the meaning of the sub-section was approved in *Cribb v. Kynochs, Ltd.* (No. 2) [2140] and *Neale v. Electric and Ordnance Accessories Co., Ltd.* [2142].

2142.—*Neale v. Electric and Ordnance Accessories Co., Ltd.* [1906] 2 K. B. 558; 75 L. J. K. B. 974; 95 L. T. 592; 22 T. L. R. 732—C. A.

Where, upon the dismissal of an action brought by a workman under age, by his next friend, against his employers, to recover damages in respect of personal injuries occasioned to the plaintiff by an accident arising out of and in the course of his employment, an application was made to the judge who tried the action to assess compensation to the plaintiff under the Workmen's Compensation Act, 1897, s. 1, sub-s. 4, and the judge accordingly awarded such compensation:

HELD—that the plaintiff was estopped by the election to take such compensation and the award thereupon made from proceeding further with the action, and therefore a subsequent application by him for judgment or a new trial in the action could not be entertained.

Notes.—*Edwards v. Godfrey* [2141] followed. *Beckley v. Scott*, [2150] commented upon and not followed. *Isaacson v. New Grand (Clapham Junction), Ltd.* [2143] discussed.

2143.—*Isaacson v. New Grand (Clapham Junction), Ltd.*, [1903] 1 K. B. 539; 72 L. J. K. B. 227; 88 L. T. 291; 19 T. L. R. 150—Div. Ct.

An action brought in the county court by the personal representatives against the employers of a workman killed by an accident

arising out of and in the course of his employment having been decided in favour of the defendants, the plaintiffs applied under s. 1, sub-s. 4, of the Workmen's Compensation Act, 1897, for compensation under that Act, and the judge assessed the compensation and made his award in favour of the defendants. The plaintiffs duly applied to the High Court for a new trial of the action.

HELD—that the plaintiffs by taking the proceedings for compensation had not in the circumstances exercised the option given them by s. 1, sub-s. 2 (b) of the Act, and were not disentitled to a new trial of the action, inasmuch as, in order to avail themselves of the remedy provided by sub-s. 4, they must have proceeded on the footing that the defendants were not liable in the action, and as they had applied for a new trial they had not proceeded on that footing.

Notes.—*Edwards v. Godfrey*, [2141] considered.

2144.—*Ryan or Little v. P. and W. MacLellan, Ltd.* (1900), 37 Sc. L. R. 287 ; 2 F. 387—Ct. of Sess.

A workman, who had sustained injuries, received from his employers weekly payments for a period of six months, and granted receipts for same, some of which bore to be granted “in full satisfaction of amount due to me as compensation under the Workmen's Compensation Act, 1897 . . . based on my average weekly earnings, in accordance with the said Act” ; the others were on account of “compensation.” He then brought an action against his employers for damages on account of the same injuries at common law, and under the Employers' Liability Act, 1880. He averred that he had accepted the payments made to him as payments to account of compensation due to him by law and that he did not understand that he was thereby making an election to take under the provisions of the Workmen's Compensation Act, 1897.

HELD—firstly, that the receipts, according to their terms, imported an election to take under the provisions of the Workmen's Compensation Act, 1897 ; secondly, that the pursuer had not stated a relevant ground for setting aside the receipts ; and therefore, thirdly, that under the Workmen's Compensation Act, s. 1, sub-s. 2, the pursuer was barred from proceeding with the action ; but the court having in view the provisions of s. 1, sub-s. 4, of the Act, remitted to the sheriff to determine the amount of compensation due under that Act.

2145.—*Campbell v. Caledonian Railway Co.* (1899), 1 F. 887 ; 36 Sc. L. R. 699—Ct. of Sess.

In an action of damages for personal injury at common law and under the Employers' Liability Act, 1880, the defenders averred that the pursuer had claimed and received compensation under the Workmen's Compensation Act, 1897.

HELD—that the averments were relevant to support a plea of bar.

2146.—Howell v. Bradford & Co. (1911), 104 L. T. 433 ; 4 B. W. C. C. 203—C. A.

A workman was injured by accident. He gave notice under the Employers' Liability and Workmen's Compensation Acts. His employers settled with him for a lump sum, obtaining a receipt releasing them from all liability under the Employers' Liability Act, and at common law. The workman died, and his dependants claimed under the Workmen's Compensation Act, 1906, subject to the deduction of the sum paid under the settlement. The county court judge found as a fact that there had been no *bond fide* exercise by the workman of his option to take proceedings independently of the Workmen's Compensation Act, 1906, and made an award in favour of the dependants.

HELD—that the right of the dependants was independent of, and not derivative from, that of the deceased, and that therefore, on the county court judge's finding of fact, they were entitled to recover.

2147.—Burton v. Chapel Coal Co., Ltd., [1909] S. C. 430 ; 46 Sc. L. R. 375—Ct. of Sess.

A claim for compensation for accidental injuries brought by a miner against his employers under the Workmen's Compensation Act, 1897, was refused by the arbitrator on the ground that the miner had been guilty of serious and wilful misconduct ; thereafter he brought an action at common law against his employers for damages for personal injuries sustained in the accident.

HELD—that having elected to claim compensation under the Act, and having obtained a final judgment upon that claim, he was barred by the provisions of s. 2 (b) from suing an action of damages at common law.

Opinions (*per* Lords Kinnear and M'Laren), that the decision of an arbitrator upon a question of fact in an arbitration under the Workmen's Compensation Act, 1897, was not *res judicata* in a subsequent common law action for damages by the workman against his employers, the arbitration being a proceeding for indemnification irrespective of contract or fault, whereas the action was a proceeding based on fault or negligence.

Notes.—*Cribb v. Kynochs, Ltd.* (No. 2) [2140] approved. Grounds of judgment in *Beckley v. Scott* [2150], and *Rouse v. Dixon* [2149] disapproved. *Blain v. Greenock Foundry Co.* [2151] and *M'Donald v. James Dunlop & Co.* [2152] distinguished. *Edwards v. Godfrey* [2141] cited.

2148.—Mehaffey v. Collen Brothers (1902), 36 Ir. L. T. 216—C. A.

A workman who was injured by accident gave notice thereof to his employers, and received half wages, for which he signed receipts. He subsequently brought an action independently of the Act, against his employers in respect of the same injuries.

HELD—that the action was barred, as he had exercised his option by accepting the payments.

2149.—*Rouse v. Dixon*, [1904] 2 K. B. 628 ; 73 L. J. K. B. 662 ; 91 L. T. 436 ; 53 W. R. 237 ; 68 J. P. 406 ; 20 T. L. R. 553—D.

A workman who withdraws notice of injury and request for arbitration under the Workmen's Compensation Act, 1897, upon the employer objecting that the workman's claim is not within that Act, is not debarred from bringing an action in respect of the same injury under the Employers' Liability Act, 1880, inasmuch as the workman has not exercised his "option" within the meaning of s. 1, sub-s. 2 (b), of the Act of 1897. There is no real option where there is no liability under the Act of 1897.

Notes.—Lord Alverstone in his judgment, referring to the decision in *Edwards v. Godfrey* [2141] said: "That decision is only upon sub-s. 4, and does not lay down any general principle or any such rule as that for which the respondent now contends, and it is not to be extended to cases which do not come within it. To my mind the reasoning of the decision in *Beckley v. Scott* [2150] is unanswerable, and it is not inconsistent with *Edwards v. Godfrey*, *supra*. In my view s. 1, sub-s. 2 (b), recognises the liability of the employer under the common law or the Employers' Liability Act, as still existing, and preserves that liability, and only prevents subsequent proceedings when a claim under the Workmen's Compensation Act has been carried through to a determination upon the merits."

2150.—*Beckley v. Scott*, [1902] 2 Ir. R. 504 ; 36 Ir. L. T. 130—C. A.

When a workman has proceeded to have compensation for his injuries assessed under the Workmen's Compensation Act, and is defeated by reason of a ruling that his case does not come within the provisions of the Act, he is not thereby prevented from instituting subsequent proceedings independently of the Act to enforce any previously existing remedy to which he may have been entitled (*Holmes, L.J., diss.*).

Notes.—*Edwards v. Godfrey* [2141] distinguished. *Lysons v. Knowles*, [1900] 1 Q. B. 780 [2579] ; *Stuart v. Nixon and Bruce*, [1900] 2 Q. B. 95 [2579], and *Tong v. Great Northern Railway*, 18 T. L. R. 566 [2382], referred to. It must be remembered that the decision of the majority of the Court of Appeal in Ireland in this case was expressly disapproved in *Cribb v. Kynochs* (No. 2) [2140] by the Court of Appeal in England.

2151.—*Blain v. Greenock Foundry Co.* (1903), 5 F. 893 ; 40 Sc. L. R. 639—Ct. of Sess.

An award of compensation under the Workmen's Compensation Act, 1897, to certain relatives of a deceased workman does not render incompetent an action for damages and *solatium* at the instance of relatives who have no title to claim compensation under the Act.

HELD FURTHER—that a son who had claimed compensation under the Act of 1897, on account of the death of his father, but was also found to have no title to insist in the claim, since he was only partially

dependent upon his father, and there were in existence others who were wholly dependent on the deceased, was not by reason of his unsuccessful claim barred from bringing an action for damages independently of the Act against the employers in respect of the death.

Notes.—Under the Act of 1906, Schedule I. (8), it is possible for a partial dependant to claim compensation when there are also persons in existence wholly dependent.

2152.—*M'Donald v. James Dunlop & Co.* (1905), 7 F. 533 ; 42 Sc. L. R. 394—Ct. of Sess.

A claimant who had been refused compensation under the Workmen's Compensation Act, 1897, as not being a dependant of the deceased workman, is not thereby barred from suing the deceased's employer at common law or under the Employers' Liability Act, 1880.

Notes.—*Rouse v. Dixon* [2149] and *Blain v. Greenock Foundry Co.* [2151] followed. Lord Adam in his judgment said: "It is quite true that if the option is exercised by a person bringing an action of damages, and the person exercising that option fails in that action, then a claim under the Workmen's Compensation Act must be disposed of by the court at the same time; and for this reason, as it appears to me, that the whole facts of the case are before the court upon which the judge can award compensation; but that is not so in the converse case, and therefore there is no similar provision in the Act for dealing with that case. But I see nothing that is to prevent a claim for damages being made."

2153.—*Taylor v. Hamstead Colliery Co.*, [1904] 1 K. B. 838 ; 73 L. J. K. B. 469 ; 90 L. T. 363 ; 20 T. L. R. 338 ; 68 J. P. 300 ; 52 W. R. 417 ; 6 W. C. C. 34—C. A.

A workman who had joined a scheme duly certified under s. 3, sub-s. 1, of the Workmen's Compensation Act, 1897, was killed by accident. His legal personal representatives brought an action to recover damages under the Employers' Liability Act, 1880.

HELD—that the contract by the workman that the provisions of the scheme should be substituted for the provisions of the Act was an exercise of the option given to him by s. 1, sub-s. 2 (b), of the Act to claim compensation under the Act, and was a bar to the claim to the recovery by his representatives of damages under the Employers' Liability Act, 1880.

Notes.—*Edwards v. Godfrey* [2141] applied. Dissident judgment of Holmes, L.J., in *Beckley v. Scott* [2150] approved.

2154.—*Mackay v. Rosie* (No. 1), [1908] S. C. 174 ; 45 Sc. L. R. 178—Ct. of Sess.

In defence to an action for damages at common law for personal injuries, the master pleaded that the action was barred by s. 1,

sub-s. 2 (b), of the Workmen's Compensation Act, 1897, the workman having elected to take compensation under the Act. At the end of the week in which he was injured the workman was paid a sum in lieu of wages, and was told that for the next two weeks he would get nothing, but that after that he would be paid half wages. Subsequently, for a period of about six months, he received each week a sum amounting to slightly more than half his average weekly wage. These payments were at first made at his house, but afterwards, when he had partially recovered, he called for them regularly at his employer's office. No receipts were taken for these payments.

HELD—that he had elected to accept, and had accepted, compensation under the Workmen's Compensation Act, and was barred from maintaining an action.

Note.—*Valenti v. William Dixon, Ltd.* [2156]; *Fowler v. Hughes* [2155]; *Little v. P. and W. MacLellan, Ltd.*, 2 F. 387 [2144], distinguished (*per* the Lord President) on the ground that in the present case “there is no written receipt, and indeed no writing at all, to which appeal can be made.” Though his Lordship added: “I am of opinion, however, that the fact of there being no written receipt is by no means conclusive.”

2155.—*Fowler v. Hughes* (1903), 5 F. 394; 40 Sc. L. R. 321—Ct. of Sess.

A workman who was in hospital, as a result of an accident happening in the course of his employment, signed a receipt for money “received under the Workmen's Compensation Act, 1897” from the employer, “being compensation due” for the accident. The injured man signed his name, and filled in his address and occupation, the date and the sum paid, and he received 12s. 6d. from his employer. Nothing was said as to the footing on which the receipt was granted, and it was not proved that the workman read it. Upon the workman raising an action for damages at common law or under the Employers' Liability Act, 1880, the defendant relying on the receipt maintained that the action was incompetent, the plaintiff having elected to take compensation under the Act of 1897.

HELD—that the election to take compensation under the Act of 1897 had not been sufficiently proved, for there was nothing in the evidence to show that the workman at the time he signed the receipt knew the difference between his rights at common law and his rights under the Act of 1897.

Note.—*Little v. P. and W. MacLellan, Ltd.*, 2 F. 387 [2144], distinguished.

2156.—*Valenti v. William Dixon, Ltd.*, [1907] S. C. 695; 44 Sc. L. R. 532—Ct. of Sess.

To an action for personal injuries the defender pleaded that under s. 1, sub-s. 2 (b), of the Workmen's Compensation Act, 1897, the action was not maintainable, as the pursuer had claimed and accepted compensation under the Act of 1897. It appeared that the workman was an Italian imperfectly acquainted with English and wholly

unable to read or write it; that he had applied for money for his injuries; that he had accepted two sums from the defenders consisting of the amount due to him under the Act of 1897 for three weekly payments, and had with his mark authenticated two receipts therefor which bore to be for payments under the Act of 1897; that he knew of his right to half wages during incapacity, but did not know of the Act by name or of his rights apart from the Act; and that the receipts were not read over or explained to him.

HELD—that it had not been proved that the pursuer had elected to take compensation under the Act of 1897, and that consequently he was not barred from maintaining the present action.

Note.—*Fowler v. Hughes* [2155]; *Little v. P. and W. MacLellan* 2 F. 387 [2144], referred to.

2157.—*Elliott v. Liggins*, [1902] 2 K. B. 84; 71 L. J. K. B. 483; 87 L. T. 29; 50 W. R. 524; 18 T. L. R. 514—D.

Where a workman has, by agreement between himself and his employer, received the maximum compensation under the Workmen's Compensation Act, 1897, during incapacity for work resulting from injury by accident arising out of his employment, he is not entitled in addition to sue the employer for wages under his contract of employment in respect of a period which is subsequent to the accident, and in respect of which he has received the compensation.

2158.—*Simmonds v. Stourbridge Brick and Fire Clay Co., Ltd.*, [1910] 2 K. B. 269; 79 L. J. K. B. 997; 102 L. T. 732; 26 T. L. R. 430—Div. Ct.

The plaintiff, a miner in the service of the defendants, was, by the custom of the colliery, entitled to certain allowance coal during incapacity caused by accident. Having been injured by accident in the course of his employment the plaintiff claimed and was awarded compensation under the Workmen's Compensation Act, 1906. He thereafter brought an action against the defendants claiming the allowance coal under the custom.

HELD—that the plaintiff's right to the allowance coal formed one of the terms of his contract of service with the defendants, and was not in the nature of compensation for the injury received, and that consequently he was not debarred by the provisions of s. 1, sub-s. 2 (b), of the Workmen's Compensation Act, 1906, from maintaining the action, after an award for compensation under the Act had been made in his favour.

2159.—*Codling v. John Mowlem & Co., Ltd.* (1913), 108 L. T. 1033; 29 T. L. R. 619—Atkin, J.

The Workmen's Compensation Act, 1906, s. 1, sub-s. 1, provides that: "If in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall . . . be liable to pay compensation in accordance with the first schedule of this Act." Sub-sect. 2 (b) provides that:

“ When the injury was caused by the personal negligence or wilful act of the employer or of some person for whose act or default the employer is responsible, nothing in this Act shall affect any civil liability of the employer, but in that case the workman may at his option either claim compensation under this Act or take proceedings independently of this Act ; but the employer shall not be liable to pay compensation for injury to a workman by accident arising out of and in the course of the employment both independently of and also under this Act, and shall not be liable to any proceedings independently of this Act, except in case of such personal negligence or wilful act as aforesaid.” Sect. 13 provides that : “ Any reference to a workman who has been injured shall, where the workman is dead, include a reference to his legal personal representative or to his dependants or other person to whom or for whose benefit compensation is payable.” A workman who was killed as the result of an accident arising out of and in the course of his employment left a widow and six children dependent on him. A claim having been made upon his employers under the Workmen’s Compensation Act, 1906, they paid into court the maximum amount for which they could be held liable under the Act, with an admission of liability. The sum so paid in was invested for the benefit of the children of the deceased with the knowledge and consent of the widow, who made no claim under the Act. Subsequently the widow brought an action against the employers claiming damages under Lord Campbell’s Act.

HELD—that the action was not maintainable by virtue of the provisions of s. 1, sub-s. 2 (b), of the Workmen’s Compensation Act, 1906.

Notes.—The defendants in this case contended that the plaintiff’s claim was barred either because (a) he had finally elected to claim compensation under the Act, or because (b) the employers had already paid the full amount of compensation under the Act, and were therefore not liable to pay compensation independently of the Act. *Atkin, J.*, in dealing with the first point, said that it had been held that a workman had conclusively made his election in the following cases : *Edwards v. Godfrey* [2141] ; *Neale v. Electric and Ordnance Accessories Co., Ltd.* [2142] ; *Cribb v. Kynochs* (No. 2) [2140], but that it had been held that he had not made his election in *Isaacson v. New Grand (Clapham Junction), Ltd.* [2143] (*quære*, whether this is consistent with *Neale v. Electric etc. Co.* and *Rouse v. Dixon* [2149]). In his Lordship’s opinion the question of election was primarily one of fact. *Calder v. Dobell*, 6 C. P. 486 ; *Curtis v. Williamson*, 10 Q. B., at p. 59 ; *Scarf v. Jardine*, 7 App. Cas., at p. 360 ; *Kendall v. Hamilton*, 4 App. Cas., at p. 542, also referred to on this point. After examining the above mentioned cases his Lordship said : “ I do not think that on the assumed facts the necessary legal inference is that there was a final election, and I decline to draw such an inference. . . . I have dealt fully with the facts upon the first point in case I should be wrong in holding that the provision that the employer is not to be liable twice over affords a separate protection to the employer in addition to the right to have the workman bound by his election. But, being of opinion, as I am, that it does afford a separate defence, I think that on the second point the defendants

are entitled to succeed. The employer has been made liable to pay, and has, in fact, paid compensation for injury to a workman by accident arising out of and in the course of his employment under the Workmen's Compensation Act by an award duly made. It seems to me immaterial whether such liability was imposed and payment made with the knowledge and consent of the plaintiff or not, but in this case the plaintiff both knew and consented. I think the employers are by the terms of the Act not liable also to pay compensation for such injury independently of the Act, and the plaintiff in this action seeks to impose such a liability."

2160.—Stephens v. Dudbridge Ironworks Co., [1904] 2 K. B. 225 ; 73 L. J. K. B. 739 ; 90 L. T. 838 ; 52 W. R. 644 ; 68 J. P. 437 ; 20 T. L. R. 492—C. A.

An infant apprentice sustained personal injuries in consequence of the negligence of his employers in not fencing machinery. A claim under the Workmen's Compensation Act, 1897, was sent in to the employers on behalf of the infant, and they paid him compensation in accordance with the Act during his incapacity for work. Subsequently he commenced a common law action of negligence against them.

HELD—that the infant was not precluded from maintaining the action by the fact that he had exercised the option given to him by s. 1, sub-s. 2 (b), of the Workmen's Compensation Act, 1897, by claiming compensation under the Act, there being nothing in the Act forming an exception to the general rule that an infant is not bound by a contract made by him which is not for his benefit.

2161.—Ford v. Wren and Dunham (1903), 115 L. T. J. 357 ; 5 W. C. C. 48—Wright, J.

An option to accept compensation under the Act, instead of damages, exercised on behalf of an infant, will be set aside if not for his benefit.

2162.—M'Feetridge v. Stewarts and Lloyds, [1913] S. C. 773—Ct. of Sess.

In an application under the Workmen's Compensation Act, 1906, to end or diminish compensation payable to a minor workman, the arbitrator found that the workman had agreed to accept compensation at a certain rate, and reduced the amount. The workman having thereafter sued his employers at common law for damages for his injury and for setting aside the arbitrator's finding that he had agreed to accept compensation, the defenders, on the ground that the arbitrator's decision was final on questions of fact, pleaded that the matter was *res judicata*. The court repelled the plea.

Notes.—In this case a minor, whose domicile was Irish and whose father resided in Ireland, took service as a labourer with a firm in Scotland. He was injured by accident in the course of his employment, for which he agreed, without consulting his father, to accept compensation under the Workmen's Compensation Act. Upon his bringing a subsequent action of damages at common law

the question arose as to whether the contract under which he agreed to accept compensation under the Act was governed by Irish or Scots law. According to the law of his domicile it would appear that the contract was a nullity, but according to the law of Scotland, a minor has a certain capacity to contract and his contract is not necessarily a nullity. The court held (1) that the *lex loci contractus* (Scots law) applied; (2) that as the pursuer was forisfamiliar and his father was in Ireland, the agreement was to be regarded as made by a minor who had no curator, and was therefore (according to Scots law), not null and void but reducible if enorm lesion resulted; and (3) that the pursuer was entitled to an inquiry into the facts, but that, the case being unsuitable for jury trial, the inquiry should be by proof. As to the question of *res judicata*, the Lord Justice-Clerk said: "The arbitration proceeded on an agreement which undoubtedly was entered into by the pursuer, but the pursuer is quite entitled to have that agreement and the consequent deliverance of the sheriff set aside and the whole question of his right to damages at common law opened up, if he can establish grounds for setting aside the agreement by reduction. What has been done in the proceedings before the sheriff can form no bar to the present summons on the plea of *res judicata*."

Heddel v. Duncan, June 5th, 1810, F. C.; *Argo v. Smarts*, 1 Irv. 250; *Male v. Roberts* (1799), 3 Esp. 163; *Cooper v. Cooper*, 15 R. (H. L.) 21, and other cases referred to.

The case of *Robertson v. Henderson & Sons, Ltd.* (1905), 7 F. 776, may also be referred to on the effect in Scotland of a discharge given by an infant.

SERIOUS AND WILFUL MISCONDUCT.

Sect. 1, sub-s. (2) (c) :—“ If it is proved that the injury to a workman is attributable to the serious and wilful misconduct of that workman, any compensation claimed in respect of that injury shall, unless the injury results in death or serious and permanent disablement, be disallowed.”

We regard the decision of the House of Lords in *Johnson v. Marshall, Sons & Co., Ltd.* [2163] as being the leading case on this point. In it the meaning of the words “ serious and wilful misconduct ” was fully discussed. In order that the sub-section may apply it is necessary that the misconduct should be “ wilful ” (*Reeks v. Kynoch* [2164]) and “ serious ” (*Wallace v. Glenboig Fire Clay Co.* [2165]). Even if the workman is guilty of serious and wilful misconduct, he will not be disqualified unless the injury is attributable to such misconduct (*Praties v. Broxburn Oil Co.* [2166] ; *Glasgow Coal Co. v. Sneddon* [2167] ; *Leishman v. Dixon* [2168] ; *Powell v. Lanarkshire Steel Co.* [2169] ; *Brooker v. Warren* [2170] ; *M'Groarty v. Brown* [2171]).

The question whether or not the conduct is “ serious and wilful ” is purely a question of fact, and the finding of the arbitrator will not be upset unless the appellant can satisfy the court that there was no evidence upon which the arbitrator could rightly so find. This has been decided in England in the House of Lords (*Bist v. London and South Western Railway* [2172]) and the Court of Appeal (*John v. Albion Coal Co.* [2173] ; *Rees v. Powell Duffryn Steam Coal Co.* [2174] ; *Rumboll v. Nunnery Colliery Co.* [2175] ; *Douglas v. United Mining Mineral Co.* [2176] ; *Casey v. Humphries* (No 2) [2177] (in Ireland) ; *M'Caffrey v. Great Northern Railway* [2178]), and the same view has been taken in the Scotch courts (*Condron v. Paul* [2179] ; *Glasgow and South Western Railway v. Laidlaw* [2180]), although the case of *Dailly v. Watson* [2182] is not in conformity with later decisions.

A breach of a rule which is in force at the place where the workman is employed does not necessarily amount to serious and wilful misconduct, but it is yet such *prima facie* evidence of misconduct as, taken with the facts proved, may justify an arbitrator's finding of serious and wilful misconduct (*George v. Glasgow Coal Co.* [2183] ; *Donnachie v. United Collieries, Ltd.* [2184]). The circumstances of each case must be considered, as the question is purely one of fact (*Guthrie v. Boase Spinning Co.* [2185] ; *Lynch v. Baird* [2186] ; *Todd v. Caledonian Railway Co.* [2187] ; *O'Hara v. Cadzow Coal Co.* [2188] ; *United Collieries v. M'Ghie* [2189] ; *Waddell v. Coltness Iron Co.* [2190]). But the failure of a workman to inform himself of a rule will not necessarily amount to serious and wilful misconduct (*M'Nichol v. Spiers, Gibb & Co.* [2191] ; *Logue v. Fullerton* [2192]),

although it may do so (*Dobson v. United Collieries* [2193]). The question is purely one of fact (*Mitchell v. Whitton* [2194]).

Where the disablement is “serious and permanent,” the workman will be entitled to compensation although he has been guilty of serious and wilful misconduct (*Hopwood v. Olive and Partington, Ltd.* [2195]). The question of “serious and permanent” disablement is one of fact (*Brewer v. Smith* [2196]). The defence of “serious and wilful misconduct” cannot be set up against a deceased workman’s representative (sect. 1, sub-s 2 (c)). The cases are arranged as follows.

- I. General Principles.
- II. Fact or Law.
- III. Breach of Known Rule.
- IV. Workman’s Failure to inform Himself of Rule.
- V. Serious and Permanent Disablement.

I. *General Principles.*

2163.—**Johnson v. Marshall, Sons & Co., Ltd.**, [1906] A. C. 409 ; 75 L. J. K. B. 868 ; 94 L. T. 828 ; 22 T. L. R. 565—H. L. (E.).

The mere breach of a rule or order from which no serious consequences could reasonably have been anticipated is not such "serious and wilful misconduct" under the Workmen's Compensation Act, 1897, as disentitles to compensation for death or injury occasioned thereby. The *onus* of proving such misconduct lies upon the person asserting it.

A workman was found crushed to death in an empty lift. There was no evidence how he came there. On the lift there was a notice : "No one is allowed to use this hoist except in charge of a load." There was evidence that men sometimes used the lift without a load. The arbitrator dismissed a claim for compensation by the widow on the ground of "serious and wilful misconduct" by the workman.

HELD—that there had been no "serious and wilful misconduct" within the meaning of the Act.

Notes.—This decision is of the greatest importance, as it was the first case in which an attempt was made to define the meaning of "serious and wilful misconduct." In his judgment Lord Loreburn, L.C., said : "No doubt it was misconduct to enter the lift when not in charge of a load, for that was disobedience of orders lawfully given. It was 'wilful' in the sense that the man presumably entered of his own accord, but the word 'wilful,' I think, imports that the misconduct was deliberate, not merely a thoughtless act on the spur of the moment. Further, the Act says it must be 'serious,' meaning not that the actual consequences were serious, but that the misconduct itself was so." Lord James of Hereford said : "It is impossible to give any general definition of the words 'serious and wilful misconduct'; application of them must be made to each case as it arises. But the use of the word 'serious,' shows that misconduct alone will not suffice to deprive the workman of compensation. The class of misconduct that would do so might well be represented by such instances as if a workman, whilst working in a mine on certain seams of coal, struck a match and lit his pipe, or if he walked into a gunpowder factory with nailed boots, refusing to use the list slippers provided for him. . . . But on the other hand, misconduct may well exist that is not 'serious' in its nature, and therefore, does not destroy the right to compensation. . . . The misconduct, therefore, is reduced to the bare breach of a rule, from which breach no injuries, actionable or otherwise, could reasonably be anticipated. Does this amount to serious misconduct? In my opinion it does not. I think there is a test that may fairly be applied. Supposing the employer, on learning that a workman had travelled in the lift without a load, had dismissed him without notice, and that in consequence an action had been brought by the workman. The question whether the misconduct was sufficient to justify the dismissal without the notice contracted for would be for the jury to determine. I feel sure that most juries would certainly hold that no ground for

dismissal had been shown. Yet I think that the words of the statute, 'serious misconduct,' represent a higher standard of misconduct than that which would justify immediate dismissal." Lord Atkinson, in his judgment said: "In none of the authorities to which we have been referred has it been attempted to define 'serious misconduct.' It is scarcely susceptible of precise definition. What amounts to serious misconduct in any given case is a question of fact to be determined by the judge of first instance on the facts of that case, and the function of the Court of Appeal and of your Lordships' House is confined to deciding the question of law whether there was any evidence to sustain this finding." His Lordship applied the following test in determining the meaning of the word serious; "If the word 'serious' used in this connection is to have any force or weight at all given to it, it must, I think, be held to mean at least that where the risk of loss or injury resulting to any person or thing from the doing of any particular act is very remote, or where the loss or injury, even if probable, would be trivial in its nature and character the doing of that act, however wilful, would not amount to 'serious misconduct' within the meaning of this statute, unless indeed the indirect influence of the act done on the discipline of the factory is to make every transgression serious." *Rumboll v. Nunnery Colliery Co.*, 80 L. T. 42 [2175]; *Reeks v. Kynoch, Ltd.* [2164]; *Smith v. South Normanton Colliery Co.*, [1903] 1 K. B. 204 [1998], cited. See also *Weighill v. South Hetton Coal Co., Ltd.*, [1911] 2 K. B. 757 [2001]; *Harding v. Bryn-ddu Colliery Co.*, [1911] 2 K. B. 747 [1974], sub tit. "Out of the Employment," and the judgment of Lord Macnaghten in *Fenton v. Thorley* [1839].

2164.—Reeks v. Kynoch, Ltd. (1901), 50 W. R. 113; 18 T. L. R. 34—C. A.

The applicant was a lad who worked at a machine used to cut slits in the heads of screws. He had been frequently warned not to put his hand near the wheel while it was in motion. There was no guard on the wheel. A screw having fallen out on to the table before it was cut, he leaned over the machine to pick it up and replace it, and two of his fingers were cut off. The county court judge found that, though the lad was negligent, he was not "guilty of serious and wilful misconduct."

HELD—that the element of wilfulness did not enter at all into what the lad did, as he seemed to have acted on a sudden impulse, and therefore the award could be supported.

2165.—Wallace v. Glenboig Fire Clay Co., [1907] S. C. 967; 44 Sc. L. R. 726—Ct. of Sess.

For an act by a workman to amount to "serious and wilful misconduct," it must be both a wilful act of misconduct and must be not trivial or doubtful as regards quality, but must be serious.

Notes.—*Johnson v. Marshall, Sons & Co. Ltd.* [2163]; *Dobson v. United Collieries*, 8 F. 241 [2193], applied on the question of *onus* of proof, it being established by those cases that the employer must prove that the injury was "attributable" to the misconduct;

and he must prove the misconduct to have been "serious and wilful," in the sense of being something far beyond mere negligence, and more than mere misconduct. *Praties v. Broxburn Oil Co.* [2166] cited.

2166.—*Praties v. Broxburn Oil Co.*, [1907] S. C. 581; 44 Sc. L. R. 408—Ct. of Sess.

In a mine worked by stoop and room, the rooms had been worked out, and a stoop was in course of being removed. In removing the stoop, which consisted of upper and lower seams of shale separated by a bed of blaes, the method adopted was to cut off perpendicular strips from the stoop, and in the case of each strip to remove in the first place the bed of blaes and the lower seam of shale (which operation was known as "holing"), and finally the upper seam of shale. After the removal of the whole strip the roof of the mine thereby exposed was supported by "trees." In carrying out this method of working a stoop two miners had completed the operation of holing, but had not set up props to support the upper seam of shale, in contravention of one of the special rules in force at the mine, which provided that "where holing is being done sprags or holing props shall be set up as soon as there is room." Immediately after the holing was completed, and before the removal of the upper seam of shale, one of the two miners proceeded to take measurements, with the view of inserting a tree outside the stoop to support the roof of the mine. In taking these measurements, he was killed by the fall of the upper seam of shale.

HELD—that, though the deceased workman had in fact broken the rule in having failed to set sprags or holing props while carrying out the holing, his injury was directly attributable not to his breach of the rule, but to an act done by him after the operation of holing, to which the rule applied, had been completed, and that, on the facts, his injury was not *attributable* to serious and wilful misconduct.

Notes.—*Dobson v. United Collieries*, 8 F. 241 [2193]; *Johnson v. Marshall Sons & Co., Ltd.* [2163], distinguished. *Rumboll v. Nunnery Colliery Co.*, 80 L. T. 42 [2175], cited.

2167.—*Glasgow Coal Co. v. Sneddon* (1905), 7 F. 485; 42 Sc. L. R. 365—Ct. of Sess.

A miner while riding on the top of a loaded hutch in the mine, in breach of one of the rules in force in the mine, was killed by the fall of a stone from the roof of the tunnel in which the hutch was running.

HELD—that, although the miner was guilty of serious and wilful misconduct, his death was not "attributable" thereto within the meaning of s. 2, sub-s. 2, of the Act, and that his widow was not barred from claiming compensation.

2168.—*Leishman v. Dixon*, [1910] S. C. 498; 47 Sc. L. R. 410; 3 B. W. C. C. 560—Ct. of Sess.

A roadsman, working at a pit bottom, crossed the working shaft to fetch a tool, in order that he might help to repair a breakdown in

another shaft. He waited for the cage to be raised before crossing, but it was lowered again without warning, and he was severely crushed by it. A "bout-gate" or by-pass round the shaft was provided for the workmen, and though it was also used for the hutches it was never so crowded as to prevent a man passing. Though there was no special rule prohibiting workmen from crossing the shaft, it was recognised by them that there was great risk in doing so, and in practice no one crossed it unless the cage was in its seat. In an application for compensation under the Workmen's Compensation Act, 1906, the arbitrator found that the injuries were attributable to the serious and wilful misconduct of the workman, and therefore that he was not entitled to compensation.

HELD—that the facts found proved were sufficient to entitle the arbitrator to arrive at that conclusion.

Notes.—*Sneddon v. Grenfield Coal and Brick Co.*, [1910] S. C. 362 [1948]; *George v. Glasgow Coal Co.*, [1909] S. C. (H. L.) 1 [2183]; *Bist v. London and South Western Railway*, [1907] A. C. 209, at p. 212 [2172], applied.

2169.—*Powell v. Lanarkshire Steel Co.* (1904), 6 F. 1039: 42 Sc. L. R. 231—Ct. of Sess.

Some boys employed in steel works were allowed an interval of half an hour for rest between two jobs. During this interval they got into one of a number of waggons that were standing on a steeply inclined line of rails in the yard of the works. After the boys had got into the wagon, the waggons began to move down the incline, and one of the boys jumped off the wagon in order to sprag the wheels. While thus engaged he was fatally injured. The boys had no occasion to be near the waggons, and had repeatedly been warned not to go near them.

HELD—(1) that the accident did not "arise out of" the boy's employment.

(2) That the accident was attributable to the "serious and wilful misconduct" of the boy.

Notes.—*Rees v. Thomas*, [1899] 1 Q. B. 1015 [2009], distinguished.

2170.—*Brooker v. Warren* (1906), 23 T. L. R. 201; 51 S. J. 171—C. A.

A workman was employed in a factory at a circular saw which was driven by machinery. His duty was to hold the wood and guide it when it was being sawn. He was told on several occasions, both by his employer and by the factory inspector, to keep the guard upon the saw when it was in use. The object of the guard was to prevent the wood which was being sawn, if it was jerked up, from being caught by the teeth at the back of the saw, and hurled about the workshop, to the danger of those at work there. The workman had worked for several years at circular saws before the guard was invented, and he had a great aversion to using a guard. Upon the day in question he intentionally did not place the guard upon the saw when using it, and the piece of wood which was being sawn

jerked up and was hurled by the saw against him, and he was killed. The county court judge found that the injury to the workman was not attributable to his serious and wilful misconduct within s. 1, sub-s. 2 (c) of the Workmen's Compensation Act, 1897, and made an award of compensation in favour of his widow.

HELD—that the injury was caused by the serious and wilful misconduct of the workman, and that his widow was not entitled to compensation under the Act.

Notes.—In his judgment in this case, Collins, M.R., said : “ The deceased man knew of the orders given to him on many occasions both by the factory inspector and by his employer to use the guard when working the saw, and he deliberately refrained by using the guard. He was guilty of misconduct in deliberately and intentionally refusing to obey the order to use the guard, and the misconduct was wilful, and that misconduct was serious because it produced a condition of danger to himself and others.”

2171.—*M'Groarty v. Brown* (1906), 8 F. 809; 43 Sc. L. R. 598—Ct. of Sess.

Being drunk and unfit to work is “ serious and wilful misconduct ” on the part of a workman within s. 1, sub-s. 2 (c), of the Workmen's Compensation Act, 1897.

Notes.—*Per* the Lord President : “ The main fact that the man was drunk and unfit for work, and that the accident happened solely owing to his condition, was enough to disentitle him to compensation under the Act.”

II. *Fact or Law.*

2172.—*Bist v. London and South Western Railway*, [1907] A. C. 209; 76 L. J. K. B. 703; 96 L. T. 750; 23 T. L. R. 471; 51 S. J. 444—H. L. (E.).

HELD (Lord James of Hereford *dubitante*) on the evidence—that an engine-driver, who in contravention of an order of his employers of which he was aware, left the footplate of his engine and went on the tender while the train was in motion, and was killed by collision with a bridge under which the train passed, was guilty of “ serious and wilful misconduct ” within the meaning of the Workmen's Compensation Act, 1897, s. 1, sub-s. 2 (c).

Notes.—*Johnson v. Marshall, Sons & Co., Ltd.* [1906] A. C. 409 [2163], cited. In this case Lord Halsbury ([1907] A. C., at p. 212) said : “ We have no right to interfere with the finding of a county court judge upon a matter of fact. We can say, because then it becomes a matter of law, where there is no evidence upon which a reasonable man could find such facts as would give him jurisdiction—we can say, as a matter of law, that it was a thing that he had no right to find, because he had not the materials upon which to find it. But no one can say that that observation is applicable to this case.” . . . Here the sole question before us, the only thing that could be argued as a question of law, is whether there was evidence to be

submitted to a jury. It is manifest that there was evidence here, and we have no power to interfere with the decision."

2173.—*John v. Albion Coal Co.* (1901), 65 J. P. 788 ; 18 T. L. R. 27—C. A.

A miner, at work in a colliery, was walking along the main haulage road. He was warned that there was risk in going on, as a "journey" of trams was approaching, but notwithstanding such warning he went on and was killed by the trams.

HELD—that there was evidence to support the county court judge's finding that the workman had been guilty of serious and wilful misconduct.

Notes.—In his judgment the Master of the Rolls said that in his opinion the question of "serious and wilful misconduct was a question of fact for the county court judge. The only way in which his finding could be questioned was by showing that there was no evidence upon which he could so find." *Rees v. Powell Duffryn Steam Coal Co.* [2174] referred to.

2174.—*Rees v. Powell Duffryn Steam Coal Co.* (1900), 64 J. P. 164—C. A.

While the applicant was at work in a mine his lamp went out, and thereupon he went to the lamp station to have it relighted. In order to get back to the place where he had been at work he had to go along a way where trams were hauled by means of a rope, and in which were manholes at certain intervals in which the men could stand till trams passed. He was told, and he could himself see by the rope being in motion, that some trams were coming towards him, but he went on with the object of reaching one of the manholes, and while so proceeding the haulage rope slipped and struck him, breaking his leg.

HELD, upon these facts—that there was no evidence of "serious and wilful misconduct" on the part of the applicant.

2175.—*Rumboll v. Nunnery Colliery Co.* (1899), 80 L. T. 42 ; 63 J. P. 132—C. A.

Breaches of the rules made under the Coal Mines Regulation Act, 1887, committed by a workman employed in a coal mine do not necessarily amount to "serious and wilful misconduct" within the meaning of s. 1., sub-s. 2 (c), of the Workmen's Compensation Act, 1897.

Notes.—All the judges in this case were of the opinion that the question as to what amounts to "serious and wilful misconduct," is purely one of fact.

Per Chitty, L.J. : "The county court judge has found that the injury to the plaintiff was not attributable to his 'serious and wilful misconduct.' That is a finding of fact."

Per Collins, M.R. : "I think that if this case had been tried by

a jury, the judge could not have withdrawn the question from the jury and have directed them that there was 'serious and wilful misconduct.' "

Per A. L. Smith, L.J. : " In appeals under this Act, this court has only to deal with questions of law and cannot review the findings of fact. . . . It is impossible for this court to say that there is 'serious and wilful misconduct' in every case of a breach of the rules. We cannot lay that down as a matter of law."

2176.—Douglas v. United Mining Mineral Co., Ltd. (1900), 2 W. C. C. 15—C.A.

It was the habit of miners in a lead mine to proceed from the lower to higher level by a sump shaft provided for raising metals, although the proper and safer way was by means of a ladder. At the time of the accident a miner was leaving by way of the sump shaft. The county court judge found that the accident was not due to serious and wilful misconduct.

HELD—that there was evidence to justify this finding.

Notes.—*Brydon v. Stewart*, 2 Macq. H. L. 30 [3044], cited.

2177.—Casey v. Humphries (No. 2), [1913] W. C. & I. Rep. 485; 57 S. J. 716; 29 T. L. R. 647; 6 B. W. C. C. 520—C. A.

The applicant for compensation was a girl of fourteen, who was engaged as a bottler in a soda water factory. While she was at work a bottle exploded in the machine, and a piece of glass struck and injured her right wrist, with the result that she was disabled for fourteen weeks. At the time of the accident she was wearing a glove on her left hand, but had no protection on the right as required by the special rules under the Factory and Workshop Acts for the bottling of soda water, which were posted up. The employer set up that the accident was due to the applicant's serious and wilful misconduct in not wearing protective gauntlets on both arms as required by the rules, and as she had been told to do by himself and the forewoman. The county court judge found that gauntlets were provided, that the applicant knew she had to wear them, but that the forewoman, whose duty it was to see that the applicant wore them, had allowed her to do the work without a gauntlet on her right hand and to disregard the rules, and only verbally told the applicant to obey the rules to protect herself with the employer. The county court judge therefore held that the defence of serious and wilful misconduct had not been established.

HELD—that the court would not interfere with the decision of the county court judge.

2178.—M'Caffrey v. Great Northern Railway Co. (1902), 36 Ir. L. T. R. 27—C. A. (Ir.).

Where by the rules of a railway company it was provided that when a lorry or truck was run on the line it should be taken in the same direction as the trains ran, and a ganger in the employment of

the company was working a lorry on the line, and in breach of this rule, ran the lorry on the wrong line and sustained serious injury by reason of the lorry coming in contact with a special train of which he had not received any warning, and where the county court judge dismissed his application on the ground that the accident was attributable to his own serious and wilful misconduct :

HELD—that there was evidence to sustain the finding, and therefore it was a question of fact and not of law, and the Court of Appeal had no jurisdiction to review the case.

HELD, FURTHER—that the applicant could not set up contributory negligence on the part of the company.

Notes.—In his judgment Fitzgibbon, L.J., said : “ In one case only—*Rees v. Powell Coal Co.* [2174]—was the finding of fact of a county court judge as to serious and wilful misconduct reversed by the court above. From the facts in that case we agree that there was no evidence of serious misconduct.”

2179.—*Condron v. Paul* (1903), 6 F. 29 ; 41 Sc. L. R. 33—Ct. of Sess.

A miner employed in a coal mine at a place adjoining a wheel brae on which there were two sets of rails, one for ascending and the other for descending hutches, was injured in crossing the wheel brae while the hutches were running. He was well aware that it was most dangerous to do so. Had he waited until the hutches had ceased running, he could by shouting to the man in charge at the top of the wheel brae have been able to cross in safety. The sheriff dismissed the applicant's claim for compensation on the ground that his injuries were due to his own serious and wilful misconduct.

HELD (by the Lord President and Lord Adam)—that the sheriff's judgment determined a question which, in the absence of anything to show that the sheriff had proceeded on an erroneous construction of the statute, was one of fact only and not subject to review, and by Lords M'Laren and Kinnear that the judgment involved a question of the construction of the statute, and that the construction on which the sheriff had proceeded was right.

Notes.—*Glasgow and South Western Railway v. Laidlaw*, [2180] ; *M'Nichol v. Spiers, Gibb & Co.*, 1 F. 604 [2191], referred to. *Fenton v. Thorley*, [1903] A. C. 443 [1839], cited. See also the notes to *George v. Glasgow Coal Co.* [2183] and *Donnachie v. United Collieries, Ltd.* [2184].

2180.—*Glasgow and South Western Railway v. Laidlaw* (1900), 2 F. 708 ; 37 Sc. L. R. 503—Ct. of Sess.

A sheriff-substitute having held that on the facts proved, in proceedings before him as arbitrator under the Act, the injury received by a workman was not attributable to his “ serious and wilful misconduct,” refused to state a case. The court refused to order the sheriff-substitute to state a case, inasmuch as, according to the facts as found by him, no question of law on the construction of the statute was raised.

2181.—*Vaughan v. Nicholl* (1906), 3 F. 464 ; 43 Sc. L. R. 351.

Where the arbitrator found “ in fact and in law ” that the workman’s action amounted to serious and wilful misconduct :

HELD—that the finding involved merely a question of fact, and was not subject to review.

Notes.—*Baird v. Birsztan* [2527] referred to.

2182.—*Daily v. John Watson, Ltd.* (1900), 2 F. 1044 ; 37 Sc. L. R. 782—Ct. of Sess.

A special rule for the mine in which the accident in question took place provided as follows : “ While charging shot-holes or handling any explosive not contained in a securely closed case or canister, a workman should not smoke or permit a naked light to remain on his cap, or in such a position that it could ignite the explosive.” A., a workman in the mine, committed a breach of this rule by wearing a lighted naked lamp in his cap while carrying cartridges which were not enclosed in a case or canister. A spark from the lamp ignited the cartridges, which exploded, causing injuries which resulted in A.’s death. The employers provided a special canister to carry cartridges, but it was a common practice among the miners (not known to the employers) not to use this canister when carrying cartridges. A. was not directly told not to carry cartridges in the way he did when he met his death ; but the sheriff found “ that it must be assumed he knew the special rules.”

HELD—(1) That the question whether A. had been guilty of serious and wilful misconduct within the meaning of the Workmen’s Compensation Act, 1897, s. 1, sub-s. 2 (c), was a question of law.

(2) That the death of A. was attributable to his serious and wilful misconduct within the meaning of that enactment ; and, therefore :

(3) That his representatives were not entitled to compensation.

Notes.—This case, in so far as it establishes the proposition that the question of “ serious and wilful misconduct ” is one of law, is not in conformity with later decisions. See the notes to *George v. Glasgow Coal Co.* [2183] ; *O’Hara v. Cadzow Coal Co.* [2188] ; *Bist v. London and South Western Railway* [2172].

III. Breach of Known Rule.

2183.—*George v. Glasgow Coal Co.*, [1909] A. C. 123 ; 78 L. J. P. C. 47 ; 99 L. T. 782 ; 25 T. L. R. 57—H. L. (Sc.).

A workman was injured in consequence of a breach of a rule providing for the safety of the workers, with respect to which express warning had shortly before the accident been given him.

HELD—that the arbitrator was justified in finding that the man had been guilty of “ serious and wilful misconduct ” within the meaning of the Workmen’s Compensation Act, 1906, and was not entitled to compensation.

Notes.—Lord Loreburn, L.C., in his judgment in this case said

that in his opinion "it is not the province of a court to lay down that the breach of a rule is *prima facie* evidence of serious and wilful misconduct. That is purely a question of fact to be determined by the arbitrator as such." Lord Robertson expressed his opinion on this question to be as follows: "You are dealing here with the conduct of a miner, and what you are in search of is misconduct on his part in regard to his business; and I do not think it rash to say, if the rule tells him not to do something, that may be *prima facie* evidence of misconduct. It is a very different question whether it is serious and wilful misconduct. The determination whether those epithets are justified depends upon more complex considerations."

2184.—Donnachie v. United Collieries, Ltd., [1910] S. C. 503; 47 Sc. L. R. 412—Ct. of Sess.

While the breach of a rule does not *per se* infer serious and wilful misconduct, it is yet such *prima facie* evidence of misconduct as, taken with the facts found proved, may justify an arbiter's finding of serious and wilful misconduct, which is a finding in fact and not in law.

Notes.—In this case the rule laid down by Lord Robertson in *George v. Glasgow Coal Co.* [2183] was adopted. *Leishman v. Dixon*, [1910] S. C. 498 [2168]; *Dobson v. United Collieries, Ltd.*, 8 F. 241 [2193], referred to.

2185.—Guthrie v. Boase Spinning Co. (1901), 3 F. 769; 38 Sc. L. R. 483—Ct. of Sess.

A woman employed in a spinning mill was injured through attempting to clean a teaser card-machine, at which she was working, while it was in motion. It was the rule and practice at the factory, known to the woman, that no cleaning of machinery was to be done unless the machinery was stopped.

HELD—that the injuries to the woman were attributable to her "serious and wilful misconduct" within the meaning of the Act, and consequently that she was not entitled to recover compensation.

2186.—Lynch v. Baird (1904), 6 F. 271; 41 Sc. L. R. 214—Ct. of Sess.

In the course of blasting operations in a mine, a brushing squad, whose work it was, had drilled a hole and filled it with a charge of an explosive called saxonite, placing at the bottom of the charge a detonator which was to be electrically exploded by means of two wires passing downwards through the charge and attached to the detonator; the foreman brusher thereafter, contrary to fact and apparently for fun, informed the fireman whose duty it was to explode the charge that it was not ready, and the fireman went away. Subsequently the fireman was sent for, but could not be found, and the foreman brusher then proceeded alone to the charge, which exploded and killed him, and it was found in fact, as the only way in which the arbitrator could account for the accident, that it was caused by friction set up by the deceased having attempted to pull out the wires communicating with the detonator. It was proved that

rule 12 (e) of the Coal Mines Regulation Act, 1887, which provides that "no explosive shall be forcibly pressed into a hole of insufficient size, and when a hole has been charged, the explosive shall not be unrammed," was well known to the deceased and carefully enforced, but it was not proved that he knew the mechanism of the detonator, or the danger of pulling the wires.

HELD—that the accident was not caused by an attempt to unram the charge in the sense of rule 12 (e), and did not result from the "serious and wilful misconduct" of the deceased, and that it arose "out of and in the course of" his employment.

2187.—Todd v. Caledonian Railway Co. (1899), 1 F. 1047—Ct. of Sess.

An engine driver was relieved from active duty when his engine was in a siding. It was then his duty to report himself off duty at the neighbouring station. In making his way to the station he was run over by a train. He had been warned that this train had been signalled, and could have proceeded by a footpath which afforded an egress from the line to the public road. There was no rule or bye-law of the railway company against their servants walking on the line.

HELD—that the accident arose out of and in the course of the engine driver's employment, and that he had not been guilty of serious and wilful misconduct.

2188.—O'Hara v. Cadzow Coal Co. (1903), 5 F. 439; 40 Sc. L. R. 355—Ct. of Sess.

In a mine there was in force rule 9 of the Additional Special Rules framed in pursuance of the Coal Mines Regulation Act, 1887, which provided that: "Where holing is being done, sprags or holing props shall be set as soon as there is room, and the distance between such sprags or holing props shall not exceed six feet, or such less distance as shall be ordered by the owner, agent, or manager." A workman in the mine was killed by a fall of coal while holing coal with four other workmen. Three of the men had holed a distance of nearly seventeen feet before the deceased and the remaining man began, and these two had holed a further distance of three feet when the accident happened. No sprag had been erected by any one in the space thus holed, though there was ample room for the erection of same.

HELD (Lord Young *diss.*)—that the deceased workman, having disobeyed rule 9, was guilty of "serious and wilful misconduct."

Notes.—In his judgment in this case Lord Young referred to the case of *Dailly v. John Watson, Ltd.*, 2 F. 1044 [2182], as follows: "I concurred in the judgment, but I think my impression was that I could not say that a question of serious and wilful misconduct was exclusively a question of law, though in that case I held, with my brethren, that law was involved in the question. But to say that it is exclusively a question of law in every case is a proposition to which I could not assent."

2189.—United Collieries v. M'Ghie (1904), 6 F. 808; 41 Sc. L. R. 705—Ct. of Sess.

By the special rules in force in a coal mine under the provisions of the Coal Mines Regulation Act, 1887, it was provided that "the bottomer at a mid-working in a vertical shaft not provided with an appliance which constantly fences the shaft, being a mid-working in use for the regular passage of workers or the drawing of minerals from the mine, shall not open the gate fencing the shaft until the cage is stopped at such mid-working." It appeared that in the mine in question a bottomer with a loaded hutch opened the gate fencing the shaft when the cage was not opposite the gate; that he, presumably through absent-mindedness, failed to notice (although there was sufficient light to enable him to do so) that the cage was not at the gate, and proceeded to push the hutch from behind till it fell down the shaft, and that he was drawn after it and was fatally injured by the fall.

HELD—that the deceased had been guilty of serious and wilful misconduct, and that his employers were not liable to pay compensation.

Notes.—*O'Hara v. Cadzow Coal Co.* [2188] cited.

2190.—Waddell v. Coltness Iron Co., Ltd. (1912), 50 Sc. L. R. 29—6 B. W. C. C. 306—Ct. of Sess.

By the special rules in force in a coal mine, under the provisions of the Coal Mines Regulation Act, 1887, it is provided (rule 95): "If a shot has been lighted and does not explode, no person shall enter the place where it was lighted until thirty minutes shall have elapsed." A miner, who was engaged in a blasting operation for which he used two cartridges, applied a light to the fuses attached to each and retired to a place of safety. After hearing only one cartridge explode he returned to the scene of the blast in the belief that he had failed to ignite the fuse of the second cartridge. He had, however, ignited it, and the cartridge exploding he was injured. In a stated case under the Workmen's Compensation Act, 1906:

HELD—that the arbiter was right in holding that the workman had been guilty of serious and wilful misconduct.

IV. *Workman's Failure to Inform Himself of Rule.*

2191.—M'Nichol v. Spiers, Gibb & Co. (1899), 1 F. 604; 36 Sc. L. R. 428—Ct. of Sess.

A miner in contravention of a rule under the Coal Mines Regulation Act, 1887, entered a place within a certain time of a blasting shot missing fire, and in consequence was injured. A copy of the rules was exposed to the view of miners at the pit head, but the rule was not known to the miner, and was not generally observed in the colliery.

HELD (1)—that the accident had arisen out of and in the course of the miner's employment; and (2) that his failure to inform himself of the rule was not "serious and wilful misconduct."

2192.—Logue v. Fullerton (1910), 3 F. 1006: 38 Sc. L. R. 738—Ct. of Sess.

A workman engaged in the process of filling scrap iron into barrows was killed owing to the defective condition of a hoist in which he was ascending to a furnace platform in order to procure hand-leathers which were necessary to his work. The furnace platform could be reached either by a fixed iron ladder or by the hoist in question. Workmen were forbidden to ascend by the hoist, a notice to that effect being posted on a wall close by, and at the time of the accident the hoist had been rendered especially dangerous by recent alterations. There was no finding that the deceased knew of the notice, and it was stated that there was no proof that his attention was directed to the changed condition of the hoist. It was further stated that some of the workmen knew of the notice and that some did not, but that all of them used the hoist.

HELD—(1) that the workman was killed in the course of his employment: and (2) that the arbitrator was right in holding that the deceased had not been guilty of serious and wilful misconduct within the meaning of the Workmen's Compensation Act, 1897.

Notes—See also *Richardson v. Denton Colliery Co.*, 6 B. W. C. C. 629 [2057].

2193.—Dobson v. United Collieries, Ltd. (1905), 8 F. 241; 43 Sc. L. R. 260—Ct. of Sess.

By the additional special rules in force in a mine under the provisions of the Coal Mines Regulation Act, 1887, it was provided (*inter alia*): "While charging shot holes or handling any explosive not contained in a securely closed case or canister a workman shall not smoke or permit a naked light to remain in his cap, or in such a position that it could ignite the explosive." These rules were duly exhibited at the mine in such a manner as to satisfy the requirements of the Act as to publication. A workman in the mine, while carrying a cartridge, not contained in a closed case or canister, failed to remove a naked light from his cap, and in crawling through a narrow road two feet in height the light came in contact with the cartridge, which exploded and injured him. The workman did not know of the special rule, nor that there was any rule against having a lamp in his cap while carrying a cartridge. In acting as he did he followed his usual practice—a practice that was also followed by other miners in the mine.

HELD—that the injury was attributable to the serious and wilful misconduct of the workman.

Seemle (*per* the Lord President and Lord Kyllachy), where a workman, except for some dominant reason, commits a breach of a duly published statutory rule, and an injury results therefrom, his *de facto* ignorance of the rule can in no circumstances prevent the injury being attributable to his serious and wilful misconduct.

Per Lord M'Laren : "There may be exceptions where the workman is excusably ignorant."

Notes.—*Dailly v. John Watson, Ltd.*, 2 F. 1044 [2182], distinguished on the ground that in that case, there being no proof one way or the other, the man was presumed to know the rule, while in the present case the man did not *de facto* know the rule. *O'Hara v. Cadzow Coal Co.*, 5 F. 439 [2188], and *United Collieries, v. M'Ghie*, 6 F. 808 [2189], distinguished on the ground that the man in those cases knew the rule. Although the above cases were distinguishable on the grounds stated, yet they were applied in the present case, in so far as they tended to give countenance to the idea that the breaking of one of these colliery rules is serious, and that doing something in contravention of them which causes an accident is serious and wilful misconduct. *M'Nichol v. Spiers, Gibb & Co.*, [2191] commented upon.

2194.—*Mitchell v. Whitton*, [1907] S. C. 1267; 44 Sc. L. R. 955—Ct. of Sess.

If an accident occurs to a carter who, in breach of the statutory provision, is riding on the shafts of his cart without holding the reins and whose horse bolts, his accident is not as a matter of law necessarily attributable to serious and wilful misconduct on his part.

V. *Serious and Permanent Disablement.*

2195.—*Hopwood v. Olive and Partington* (1910), 102 L. T. 790; 3 B. W. C. C. 359—C. A.

Where a workman was injured by accident arising out of and in the course of his employment, but the injury was attributable to his "serious and wilful misconduct" within the meaning of s. 1, sub-s. 2 (c), of the Workmen's Compensation Act, 1906—he having in breach of his employers' regulations started to clean a machine whilst it was in motion, whereby his right hand was caught in a cog-wheel and his first and third fingers were cut off at the top joint—he was nevertheless held to be entitled to compensation under the Act, the injury to him being of such a nature that it resulted in "serious and permanent disablement" within the meaning of the same sub-section.

Notes.—The meaning of "serious and permanent disablement" was considered in the judgments in this case.

Per Cozens-Hardy, M.R. : "The workman may be disabled in the labour market from being employed in innumerable occupations which otherwise would possibly have been open to him. This renders it a serious disablement, and it is not one of a temporary character."

Per Buckley, L.J. : "The words of s. 1, sub-s. 2 (a), are 'disable the workman . . . from earning full wages at the work at which he was employed.' I think that 'disablement' in s. 1. sub-s. 2 (c), means the same thing—that is to say, less able to earn full wages."

2196.—**Brewer v. Smith** (1913), 6 B. W. C. C. 651 ; [1913] W. C. & I. Rep. 593—C. A.

A county court judge found the amputation of the top joint of the middle finger of the right hand of a machinist in the joinery trade to be serious and permanent disablement within the meaning of s. 1, sub-s. 2.

HELD—there was evidence to support the finding.

SETTLING QUESTIONS BY AGREEMENT OR BY ARBITRATION.

Sect. 1, sub-s. (3) :—“ If any question arises in any proceedings under this Act as to the liability to pay compensation under this Act (including any question as to whether the person injured is a workman to whom this Act applies), or as to the amount or duration of compensation under this Act, the question, if not settled by agreement, shall, subject to the provisions of the First Schedule to this Act, be settled by arbitration, in accordance with the Second Schedule to this Act.”

This sub-section explains the circumstances under which a right to apply for arbitration may arise. In order that the applicant may resort to proceedings under the Act it is necessary that a question shall have arisen between the parties, and further, that such question shall not have been settled by agreement. It is a condition precedent to the jurisdiction of the county court judge to entertain arbitration proceedings under the Act, that a question has arisen as to the liability to pay compensation under the Act, or as to the amount or duration of compensation (*Field v. Longden* [2197]; *Caledon Ship-building and Engineering Co. v. Kennedy* [2198]; *Mercer v. Hilton* [2199]; *Brown v. Hunter* [2200]). No question will arise as to the duration of compensation where the employers pay to an injured workman the maximum weekly sum due to him under the Act, even though they from time to time intimate their opinion that the incapacity has ceased (*Gourlay v. Sweeney* [2201]), or say that they will only pay so long as their medical adviser certifies that the incapacity lasts (*Payne v. Fortescue* [2202]). But an admission of liability up to a certain date, accompanied by a request to terminate further liability, raises a question (*Bowhill Coal Co. v. Malcolm* (No. 1) [2203]), and so does tender of payment only on condition of the workman signing a receipt expressing that liability was only admitted to date of payment (*Freeland v. Summerlee Iron Co.* [2204]). A question as to the validity of a discharge granted by a workman is a question “as to the liability to pay compensation” (*Ellis v. Lochgelly Iron and Coal Co.* [2205]; *Hanley v. Niddrie and Benhar Coal Co.* [2206]). The arbitrator will have jurisdiction if there has been a dispute at the time when the application was made, even though the compensation be agreed at the time of the hearing (*Higgins v. Poulson* (No. 1) [2207]), or where at the time of making the application, there was no dispute but one was raised by the employers’ answer (*Barron v. Carmichael* [2208]). If the employers, through mistake, pay to a minor half wages, and upon the workman commencing proceedings to recover full wages immediately tender the money, no question will arise, although they refuse to pay the costs of his application (*Smith v. Abbey Park Laundry* [2211]). And a question

will not arise where a workman has expressed himself as satisfied with the payments that he has been receiving, and is urged by a trades union to try and get more (*Plant v. Oldnall Colliery Co.* [2212]), or where the judge refuses to register a memorandum of an agreement on the ground that it is not genuine (*Fox v. Battersea Borough Council* [2213]). A question will arise where the correspondence relied upon as being an agreement does not amount in law to an agreement (*Brooks v. Knowles* [2214]).

If the question has been settled by agreement the arbitrator will not have jurisdiction (*Dunlop v. Rankin* [2215]; *Lochgelly Iron and Coal Co. v. Sinclair* [2217]), but a case may be remitted to the arbitrator to decide upon the facts whether there has been an agreement (*Rees v. Consol. Anthracite Coll.* [2218]). Apparently the agreement must be an existing agreement to prevent the arbitrator having jurisdiction (*Dempster v. William Baird* [2219]). The payment of compensation to a man who is not a workman within the Act will not amount to an agreement to treat him as being within the Act (*Standing v. Eastwood* [2220]). A workman who signs a discharge under an essential error as to its effect will not be precluded from applying for arbitration (*Macandrew v. Gilhooley* [2221]; *O'Callaghan v. Martin* [2222]), and he may apply to have a discharge set aside into which he has been induced to enter by fraud or misrepresentation (*Hunter v. Darngavil Coal Co.* [2223]; *Crossan v. Caledon Shipbuilding Co.* [2224]). An agreement may be set aside on the ground of essential error, but the mere fact that the injuries have turned out to be worse than the parties thought (*M'Guire v. G. Paterson & Co.* [2225]), or that the medical evidence as to the workman's condition was mistaken (*Dornan v. Allan* [2226]), will not of itself render a discharge null and void. There must be satisfaction as well as accord in order that an agreement may be binding (*Hawkes v. Richard Coles* [2227]). An agreement may be implied from the facts of each case (*Rosie v. McKay* (No. 1) [2228]; *Dempster v. Baird* [2229]). An agreement to release the employers from liability requires consideration to support it (*Hughes v. Vothey Valley Co.* [2230]).

The cases which have been considered above turn upon the construction of the following phrases of the sub-section :—

- I. "If any Question Arises."
- II. "If not Settled by Agreement."

I. "*If any Question Arises.*"

2197.—*Field v. Longden & Sons*, [1902] 1 K. B. 47; 71 L. J. K. B. 120; 85 L. T. 571; 50 W. R. 212; 66 J. P. 291; 18 T. L. R. 65—C. A.

A workman having been incapacitated from work in consequence of personal injury caused by an accident arising out of and in the course of his employment, his employers paid him regularly after the second week from the accident a weekly sum of one-half the amount of his average weekly earnings. About five months after the accident a letter was written to the employers by a solicitor on behalf of the workman, giving them notice of the accident and of the workman's claim for compensation, and in reply the employers wrote asking what sum would be accepted in lieu of further weekly payments. In the course of the correspondence the employers wrote that they would arrange for a medical examination of the workman, and would continue the weekly payments during his incapacity for work. The workman was accordingly examined by a medical man on behalf of the employers. The negotiations for payment of a lump sum in settlement having proved unsuccessful, the workman commenced arbitration proceedings in the county court. At the hearing before the county court judge the employers contended that at the date of the filing of the request for arbitration no question had arisen as to the liability to pay compensation under the Workmen's Compensation Act, 1897, or as to the amount or duration of compensation, and, in the alternative, that all questions between the parties had been settled by agreement prior to the request being filed. The county court judge made an award in favour of the workman for a weekly payment of one-half his average weekly earnings during incapacity. Upon appeal by the employers:

HELD—that the county court judge had no jurisdiction to make the award, for upon the true construction of s. 1, sub-s. 3, of the Workmen's Compensation Act, 1897, it is a condition precedent to the jurisdiction of the county court judge to entertain arbitration proceedings under the Act, that a question has arisen as to the liability to pay compensation under the Act or as to the amount or duration of compensation, and that no such question had arisen between the parties.

Per curiam: The county court judge ought upon the evidence to have found as a fact that there was an agreement between the parties.

Per Collins, M.R.: "The proper course for the workman under the circumstances, if he was in doubt as to his position, was to propose to the employers to have a memorandum filed in the county court in accordance with clause 8 of the Second Schedule to the Act."

Notes.—See now Schedule II. (9) of the Act of 1906.

2198.—*Caledon Shipbuilding and Engineering Co. v. Kennedy* (1906), 8 F. 597, 960; 43 Sc. L. R. 430, 687—Ct. of Sess.

A workman who had been injured filed his application for arbitration two days prior to the date at which he would become entitled to compensation under the Act.

HELD—that as at the date when the application was filed no dispute had arisen between the parties as to compensation, and as the compensation was not in arrears, the conditions precedent to an arbitration under the Act were wanting, and accordingly that the application must be dismissed.

HELD, FURTHER—that the provision in Schedule II., s. 6, of the 1897 Act that “the costs of and incident to the arbitration and proceedings connected therewith shall be in the discretion of the arbitrator” does not cover the expenses of an application for arbitration found to be incompetent and premature.

Notes.—See now Schedule II. (7) of the Act of 1906. *Field v. Longden & Sons* [2197] approved.

2199.—Mercer v. Hilton (1909), 3 B. W. C. C. 6—C. A.

An employer having agreed with a workman to pay him compensation, refused to sign a form of agreement. The registrar refused to record a memorandum of the agreement. The workman then applied for an arbitration under the Act, and at the hearing the county court judge found that, in consequence of the employer's refusal to sign, there was no agreement, and made an award in the workman's favour in the terms of the agreement.

HELD—that there was no jurisdiction to make an award, as no “question” had arisen as to the liability to pay compensation or as to the amount or duration within the meaning of s. 1, sub-s. 3, of the Act.

2200.—J. Brown & Co., Ltd. v. Hunter, [1912] S. C. 996; 5 B. W. C. C. 589; 49 Sc. L. R. 695; [1912] W. C. Rep. 318—Ct. of Sess.

An application by a workman for the registration of a memorandum of agreement under the Workmen's Compensation Act, 1906, was objected to by the employers on the ground that the workman had signed a receipt which bore that compensation should be paid only while his employers were of opinion that his incapacity continued. The application was abandoned. The workman having then presented an application for arbitration to fix the amount of compensation, the employers objected on the ground that there was no “question” arising in any proceedings under the Act.

HELD—that there was a “question” in the sense of the Act, and that the workman was entitled to have the amount of his compensation determined.

Notes.—Opinion of Collins, M.R., in *Field v. Longden & Sons* [2197], that “if the workman gave notice that he proposed to send in for registration a memorandum of an agreement for payment of these amounts weekly during incapacity as compensation, and the employers were to say that there was no such agreement, then it appears to me that there would be a dispute, and a question would have arisen within section 1, subsection 3,” approved and applied *Gourlay v. Sweeney* [2201] and *Caledon Shipbuilding and Engineering Co. v. Kennedy* [2198] distinguished.

2201.—Gourlay v. Sweeney (1906), 8 F. 965; 43 Sc. L. R. 690—Ct. of Sess.

A workman who was injured on September 5th, 1905, was regularly paid by his employers the maximum weekly compensation due to him under the Act, on the footing of total incapacity, from a fortnight after the date of his injury until January 23rd, 1906. The employers having on several occasions when making the weekly payments intimated to the workman that, in their opinion and in that of their medical adviser, he had recovered, and that the weekly payments would in a short time be stopped, the workman, on January 30th. 1906, prior to the payment of the weekly sum due on that day, presented a petition for arbitration under the Act. There was no agreement between the parties as to compensation which could have been recorded. The employers objected to the competency of the petition, but the sheriff, holding that a question had arisen as to the continuance of the workman's incapacity, repelled the objection, and after a proof awarded compensation.

HELD that the petition was incompetent and must be dismissed in respect (a) that at the date when it was presented no "question" had arisen between the parties as to the duration of the compensation within the meaning of s. 1, sub-s. 3, of the Act, and (b) that the mere fact that there was no agreement between the parties capable of registration did not show that a "question" had arisen between them so as to entitle the workman to present the petition.

2202.—Payne v. N. Fortescue & Sons, Ltd., [1912] 3 K. B. 346; 81 L. J. K. B. 1191; 107 L. T. 136; 57 S. J. 80; 5 B. W. C. C. 634; [1912] W. C. Rep. 386—C. A.

A workman having met with an accident in the course of his employment which for the time being caused total incapacity for work, his employers paid him regularly from the date of the accident 17s. 6d. a week, being one-half of his average weekly earnings. The workman applied under the Workmen's Compensation Act, 1906, to have registered a memorandum of an agreement by the employers admitting their liability, and agreeing to pay him 17s. 6d. a week. The employers opposed on the ground that they had only agreed to pay so long as their own doctor should certify that the workman was wholly incapacitated. The county court judge held that the compensation had not been settled by agreement. The workman then applied to have the compensation settled by the judge as arbitrator under the Act.

HELD—that no question had arisen as to the amount or duration of the compensation which could give jurisdiction to arbitrate, though such a question might arise hereafter if and when the employers claimed to discontinue or diminish their payments.

Notes.—*Phillips v. Vickers, Sons and Maxim*, [1912] 1 K. B. 16 [2912], and *Sweeney v. Gourlay* [2201], applied. *Field v. Longden & Sons* [2197] cited. See also the decision of the House of Lords in *Freeland v. Summerlee Iron Co., Ltd.* [2204].

2203.—Bowhill Coal Co. v. Malcolm (No. 1), [1909] S. C. 426 ; 46 Sc. L. R. 354 ; 2 B. W. C. C. 131—Ct. of Sess.

A workman claimed compensation up to a certain date. The employers admitted liability up to then, but asked for a declaration that incapacity then ceased. The arbitrator refused to make the declaration on the ground that there was no dispute after the said date.

HELD—that a question had been raised by the employers' request for a declaration, and that it was the duty of the arbitrator besides finding as to the amount due, to determine whether the compensation should be ended at the said date.

2204.—Freeland v. Summerlee Iron Co., Ltd., [1912] S. C. 1145 ; 5 B. W. C. C. 598 ; 49 Sc. L. R. 841—Ct. of Sess. Affirmed, [1913] A. C. 221 ; 29 T. L. R. 277 ; 6 B. W. C. C. 255 ; [1913] W. C. & I. Rep. 302—H. L.

The employers of an injured workman admitted liability, and tendered payment of the compensation due on condition of the workman signing a receipt, which stated, *inter alia*—"At the first or any subsequent payment liability is admitted only for the compensation to date of payment. Further liability, if any, will be determined week by week, when application for payment is made." The workman having refused to sign the receipt and applied for arbitration :

HELD—that there was a "question" in the sense of the Act, and that arbitration was competent.

Notes.—In his judgment Lord Salvesen said ([1912] S. C., at p. 1147) : "If the employers admit liability, then we have held that he is not entitled to put them to the expense of such an application. But the admission must be an unqualified one, and not a qualified admission which would debar him from the right of going to the sheriff-clerk with a memorandum of his agreement and getting it registered, so as to be able to charge upon it. . . . The respondents here made no secret of the fact that they desired, by the qualification which they put into this receipt which they wished the man to sign, to invest the position of the workman and put him *in petitorio* when he partially recovered from his accident, instead of being themselves in the position of having to pay him compensation until they presented an application to have his compensation diminished or ended. It is obvious, therefore, that there is here a very substantial question."

In the House of Lords *Payne v. Fortescue* [2202] and *Gourlay v. Sweeney* [2201] discussed. Viscount Haldane, L.C., and Lord Shaw, of Dunfermline, said they did not find themselves in agreement with certain observations made in the judgments in *Payne v. Fortescue*. The Lord Chancellor did not think it necessary to go into the question whether that case was rightly decided.

2205.—*Ellis v. Lochgelly Iron and Coal Co.*, [1909] S. C. 1278; 46 Sc. L. R. 960—Ct. of Sess.

A question as to the validity of discharge granted by the workman is a question “as to the liability to pay compensation” under s. 1, sub-s. 3, of the Act, and a sheriff sitting as arbiter can competently dispose of the same.

HELD FURTHER—that the findings in fact, did not show that the arbitrator’s decision had proceeded upon a ground in law which was so clearly erroneous as to entitle the court to interfere with it.

Observations on the effect of essential error not induced by the other party.

Notes.—*Stewart v. Kennedy*, 17 R. (H. L.) 25, referred to as to the effect of essential error not induced by the other party.

2206.—*Hanley v. Niddrie and Benhar Coal Co.*, [1910] S. C. 875; 47 Sc. L. R. 726—Ct. of Sess.

A workman applied for a memorandum of agreement under the Workmen’s Compensation Act, 1906, to be recorded. The employers lodged objections on the ground that prior to the memorandum being presented the workman had signed a final discharge of his claim. The workman said that the alleged discharge, if signed by him, was signed under essential error. Both parties admitted that the question fell to be settled by arbitration under s. 12 of the Act of Sederunt of 1907 (compare rules 45 *et seq.* of Workmen’s Compensation Rules, 1907). The sheriff, as arbitrator, after hearing proof, granted warrant to record the memorandum, holding that it was incompetent for him to determine the question of the validity of the discharge in that application.

HELD—that the arbitrator could competently determine that question on the application to record the memorandum, and that as the parties had joined issue on the question he was bound to determine it.

Notes.—See now Workmen’s Compensation Rules, 1913, rule 47. *Coakley v. Addie & Sons*, [1909] S. C. 545 [2954], distinguished. *Lochgelly Iron & Coal Co. v. Sinclair* (No. 2), [1909] S. C. 922 [2217]; *M’Ewan v. William Baird & Co., Ltd.*, [1910] S. C. 436 [2939], discussed.

2207.—*Higgins v. Poulson* (No. 1) (1911), 5 B. W. C. C. 66—C. A.

At the time of filing a request for arbitration there was a dispute between a workman and his employer. The workman claimed 12s. 6d. a week. The employer admitted liability, and present total incapacity, and offered to pay 10s. per week during total incapacity. Before the hearing the compensation was agreed at 10s. per week. The county court judge held that no question had arisen, and dismissed the application.

HELD—that, as a dispute had arisen at the time when the application was made, a question had arisen within s. 1, sub-s. 3, and the application must be heard.

2208.—*Barron v. Carmichael* (1912), 5 B. W. C. C. 437; [1912] W. C. Rep. 312—C. A.

An injured workman gave notice of accident and asked for compensation. The employer replied that compensation would be paid so long as the works doctor certified incapacity. The workman objected to this limitation. He received no compensation, and neither asked for nor was refused it, further than appears above. He brought proceedings. The employer's answer denied the injuries and the incapacity and set out the circumstances under which he had offered compensation as above, and the fact that the workman had never applied for compensation. The employer at the hearing raised the point that there was no jurisdiction to hear the application as no question had arisen.

HELD—that the employer's answer raised a dispute, and the employer could not thereon say there was no question; that if the answer had first raised the point that no question had arisen, and then without prejudice thereto denied incapacity, the employer could have raised the point, and (*per* Buckley, L.J.) he would have been entitled to succeed on that point.

Notes.—*Field v. Longden* [2197] discussed.

2209.—*Strannigan v. Baird* (1904), 6 F. 784; 41 Sc. L. R. 609—Ct. of Sess.

The employers of a workman, who had sustained injuries, orally agreed to pay him 13s. 3d. weekly as compensation under the Act, but no memorandum of the agreement was recorded. The workman, after being in receipt of these weekly payments for nearly a year, on the requisition of the employers, submitted himself to examination by a medical practitioner provided and paid by them. A certificate having been granted by that medical practitioner, the workman was dissatisfied therewith, but did not submit himself for examination to one of the medical practitioners appointed under the Act, whereupon the employers discontinued the weekly payments. The workman then instituted an arbitration under s. 1, sub-s. 3, of the Act.

HELD—that he was not precluded from so doing because of his failure to submit himself to one of the medical practitioners appointed under the Act.

Notes.—*Niddrie and Benhar Coal Co. v. M'Kay*, 5 F. 1121 [2970], and *Neagle v. Nixon's Navigation Co.*, 73 L. J. K. B. 165; [1904] 1 K. B. 339, approved and followed. *Davidson v. Summerlee and Mossend Iron Co.* [2210], disapproved. These cases are of no importance on this point under the present Act. See Schedule I., paragraph (15).

2210.—*Davidson v. Summerlee and Mossend Iron Co.* (1903), 5 F. 991; 40 Sc. L. R. 764—Ct. of Sess.

A workman who had been receiving compensation under the Act from his employers by agreement, but without a memorandum of agreement having been registered, submitted himself, at his employers'

request, for examination by a medical man provided by his employers, in terms of clause (11) of the First Schedule of the Act. The medical man reported that the workman had so far recovered as to be able to do his former work. The workman was dissatisfied with this report, but did not apply to be examined by one of the medical practitioners appointed for the purposes of the Act by the Secretary of State. The employers having discontinued payment of compensation, the workman instituted proceedings for arbitration to have the amount of compensation determined.

HELD (Lord Young *diss.*)—that so long as the workman did not submit himself for examination by one of the medical practitioners appointed under the Act his right to compensation was suspended and proceedings by way of arbitration were excluded.

Notes.—The decision in this case was disapproved in *Strannigan v. Baird* [2209] and *Niddrie and Benhar Coal Co. v. M'Kay* [2970], but whether it is good law or not it is of little importance under the present Act. See Schedule I., paragraph (15). *Dowds v. Bennie*, 5 F. 268 [2633] and [2969], referred to.

2211.—Smith v. Abbey Park Laundry (1909), 2 B. W. C. C. 142—C. A.

The employers paid an injured workman at the rate of half wages from the accident, not knowing that she was a minor, entitled under Schedule I. (1) (b) to have compensation at the rate of full wages. The plaintiff commenced proceedings in the county court for the balance. The employers almost immediately tendered the money, which was refused, as costs alleged to be due were not also tendered. The county court judge awarded costs against the respondents, who appealed.

HELD—there was no dispute, and therefore no power to order costs.

Notes.—*Field v. Longden & Sons* [2197] cited.

2212.—Plant v. Oldnall Colliery Co. (1903), 114 L. T. J. 284—C. A.

The employers had been paying an injured workman weekly compensation for some months, and he had expressed himself as perfectly satisfied. The trades union, however, pointed out to him that an allowance of coal was not included in the calculation of his wages, and he subsequently applied for arbitration. As the man himself was completely satisfied, the court held the arbitrator right in holding that there was no dispute.

2213.—Fox v. Battersea Borough Council (1911), 4 B. W. C. C. 261.

In January, 1908, a workman met with an accident, and eventually became totally incapacitated. He demanded compensation from his employers. Negotiations ensued, in which the employers set up several answers to his claim, but expressed their readiness to pay somewhat less than the half wages, by way of compromise. On the advice of his solicitors, the workman accepted this, and a

formal agreement was made in May, 1909. A memorandum of this agreement was at once sent to the registrar for record. Some delay occurred, but early in 1910 the registrar refused to record the agreement on the ground that he was not satisfied as to its genuineness. In April, 1910, the workman commenced proceedings for compensation. In May, 1910, the employers applied to the judge for an order to record the memorandum of agreement. In November, 1910, the judge gave his decision thereon, refusing the order, on the ground that the agreement was not "genuine." Subsequently the workman's application for compensation was heard, and in January, 1911, the judge awarded half wages as compensation. The employers then appealed from the decisions of November, 1910, and January, 1911.

HELD—that there was no evidence on which the judge could find that the agreement was not genuine, and the memorandum ought, therefore, to be recorded; that consequently all questions had been settled by agreement, and there was no jurisdiction to hear the application for the compensation.

HELD ALSO—that the two decisions of November, 1910, and January, 1911, were part of one and the same proceeding, and the employers were entitled to appeal from both by notice of appeal entered within twenty-one days, after the later decision.

2214.—Brooks v. Andrew Knowles & Sons, Ltd. (1911), 5 B. W. C. C. 15—C. A.

Upon a workman commencing proceedings for compensation the employers objected that all matters between the parties had been settled by agreement, and produced correspondence to prove this. The county court judge ruled that there was no agreement.

HELD—that the correspondence relied upon as being an agreement did not amount in law to an agreement, and that there was, therefore, a question between the parties to be settled by arbitration.

Notes.—*Hussey v. Horne Payne* (1879), 4 App. Cas. 311; 48 L. J. Ch. 846, referred to on the effect of taking two or three letters out of a mass of correspondence in order to prove an agreement.

II. "*If not Settled by Agreement.*"

2215.—Dunlop v. Rankin and Blackmore (1901), 4 F. 203; 39 Sc. L. R. 146—Ct. of Sess.

A workman who had been injured in the course of his employment, on March 15th, received from his employers a letter in these terms: "We admit liability under the Workmen's Compensation Act, 1897, and are prepared to pay compensation at the rate of 12s. 8d. during incapacity in terms thereof." The employers, after paying compensation at the specified rate for some months, discontinued the payment on the ground that the workman had recovered. The workman then applied for arbitration under the Workmen's Compensation Act, maintaining that he was still disabled as the result of the accident, or otherwise that he was entitled to a declaration of his employers' liability in the event of supervening incapacity.

HELD—that the letter of March 15th was an agreement, of which a memorandum might have been, and might still be, recorded under s. (8) of the Second Schedule to the Act of 1897; that the parties having come to an agreement, procedure by arbitration was excluded; and consequently that the application for arbitration fell to be dismissed.

Notes.—See now Schedule II. (9) of the Act of 1906.

2216.—Ferriter v. Port of London Authority, [1913] W. C. & I. Rep. 455; 6 B. W. C. C. 732—C. A.

A workman met with an accident on August 26th, 1911, and received from his employers a payment of 12*s.* 5*d.* a week by way of advance, while he was proceeding against a firm of contractors to recover damages in respect of his injury from their alleged negligence. This action failed, and his solicitors then wrote to his employers as to the proper amount of the compensation, and claimed an increased amount. The employers denied that the workman was entitled to more than 12*s.* 5*d.* a week, and ultimately, on April 29th, 1912, his solicitors wrote a letter in which they said that they assumed "that the weekly payments will be continued." Payment continued to be made at 12*s.* 5*d.* a week, the workman giving receipts for it as "compensation." On March 18th, 1913, the workman commenced proceedings to recover an increased amount of compensation on the ground that, while his average weekly earnings from these employers were £1 4*s.* 10*d.*, he had also earned 4*s.* 6*d.* a week in a concurrent employment.

HELD—that the county court judge was justified in holding that there was an implied agreement to accept 12*s.* 5*d.* a week in satisfaction of any claim for compensation.

2217.—Lochgelly Iron and Coal Co. v. Sinclair, (No. 2) [1907] S. C. 1071; 44 Sc. L. R. 750—Ct. of Sess.

A workman who had been injured on October 12th, 1904, received weekly compensation from his employers under an agreement between them and him until January 26th, 1905, when the employers stopped the payments. The workman thereupon applied for a warrant to record a memorandum of the agreement, and the memorandum was ultimately recorded. Pending this application the employers applied to the arbitrator to find that their liability to compensate the workman came to an end on January 25th, 1905, and to grant an order declaring his right to compensation to have ended at that date, or alternatively to ascertain and fix such weekly payments as might be due to the workman under the Act, and to make an award finding him entitled to such weekly payments, beginning the first payment on February 1st, 1905, for the preceding week.

HELD—that the employer's application was incompetent in respect, first, that, as an original application for arbitration, it was excluded by the agreement of which a memorandum had been recorded; and secondly, that, as framed, it could not be treated as

an application for review of the weekly payments under the agreement.

Notes.—*Dunlop v. Rankin and Blackmore* [2215] referred to.

2218.—*Rees v. Consolidated Anthracite Collieries, Ltd.* (1912), 5 B. W. C. C. 403; [1912] W. C. Rep. 205—C. A.

A workman received compensation for some time at a certain rate, and after his return to light work, sent for record a memorandum of an agreement to pay compensation at this rate. The employers objected, the workman did not proceed to apply to have the memorandum recorded, and nothing further was done for some months. The workman then brought arbitration proceedings, claiming that he was entitled to compensation at a higher rate than had been paid to him, and demanding the arrears of the difference. The employers then, without notice to him, withdrew their notice of objection to the recording of the memorandum, and it was recorded by the registrar. The workman's application for arbitration was then dismissed by the county court judge for want of jurisdiction.

HELD—that the case should be remitted for the question to be decided whether there was any agreement or not.

2219.—*Dempster v. William Baird & Co.*, [1908] S. C. 722; 45 Sc. L. R. 433—Ct. of Sess.

A miner was injured and paid compensation under an agreement, which was not recorded, for fourteen months, when he was taken back into employment and received wages. Seven years later he became totally incapacitated as a result of his injuries, and commenced arbitration proceedings. The question then arose as to whether the arbitration proceedings were competent, or whether the workman should have filed a memorandum of the agreement.

HELD—the arbitration proceedings were competent, as there was no existing agreement regulating the rights of the parties.

Notes.—*Dunlop v. Rankine and Blackmore* [2215] distinguished. *Beath and Keay v. Ness* [2926] and *Colville v. Tighe* [2963] referred to. See also *Popple v. Frodingham Iron and Coal Co.* [2920].

2220.—*Standing v. Eastwood & Co., Ltd.* (1912), 106 L. T. 477; 5 B. W. C. C. 268; [1912] W. C. Rep. 200—C. A.

E. & Co. were the owners of barges each of which had a captain and mate. E. & Co. appointed the captain and he, without any interference from E. & Co., appointed the mate, paying him a certain proportion of the amount he received from E. & Co. E. & Co. insured against liability under the Workmen's Compensation Act in respect of all the captains and also in respect of the mates. One of the mates met with an accident on a barge on February 7th, 1910. E. & Co. paid him 6s. a week for more than six months, and it was admitted that this money came from the insurance company. A correspondence then took place between E. & Co. and a solicitor acting for the mate which resulted in his being paid 8s. a week until

May, 1911, it being admitted the money came from the insurance company. The county court judge held that there was evidence of an agreement by E. & Co. to pay the applicant 8s. a week during incapacity, and that they were estopped from contending that at the time of the accident the mate was not in their employment.

HELD—that the circumstances did not amount to an estoppel; that there had been no agreement by E. & Co. within s. 1, sub-s. 3, to treat the mate as a servant within the Act, and any such agreement was of no effect, as the Act only applied to workmen who came within the definition in s. 13.

2221.—Macandrew v. Gilhooley, [1911] S. C. 448; 48 Sc. L. R. 511; 4 B. W. C. C. 370—Ct. of Sess.

A workman, who could neither read nor write, had been affixing his mark every week to a document which acted as a receipt for weekly payments which he had been receiving as compensation for an injury. At the bottom of this document was a clause headed "Final Discharge" which freed the employers from "all claims whatsoever." The workman was told to sign this by the employers' cashier.

HELD—that the "Final Discharge" did not bar the workman's right to compensation upon the grounds that it had been granted by the workman gratuitously and under essential error as to its effect, and that there was no consideration for it at all.

Notes.—Rule in *Dickson v. Halbert*, 16 D. 586 a (case in which a discharge was granted entirely *sine causa* by people who did not understand their legal rights) applied. *Ellis v. Lochgelly Iron and Coal Co.*, [1909] S. C. 1278 [2205], referred to.

2222.—O'Callaghan v. Martin (1904), 38 I. T. L. R. 152—C. A. (Ir.).

A workman who had been injured claimed compensation, and accepted a weekly payment of half wages under the Act of 1897. After seven weeks he gave up the weekly payment and signed a final discharge under the belief that he was merely giving a receipt for the money, and with no idea that he was signing away his statutory rights.

HELD—that he had not thereby settled his claim under the Act by agreement and it was open to him to apply for arbitration.

Notes.—*Bradbury v. Bedworth Coal and Iron Co.*, 2 W. C. C. 138 [2802], considered.

2223.—Hunter v. Darngavil Coal Co., Ltd. (1900), 3 F. 10—Ct. of Sess.

A workman brought an action at common law for damages for injuries alleged to have been received through the fault of his employers. The employers, besides denying fault, averred that the workman had given written notice that he claimed compensation under the Workmen's Compensation Act, and that subsequently they had paid him compensation, and pleaded that in respect thereof the

workman was barred from suing the action. In answer the workman averred that he was induced to sign the notice shortly after the accident by false representations on the part of the employers, at a time when, through illness, he could not and did not understand its import. The Lord Ordinary (Kincairney) ordered issues for the trial of the whole case, including the question whether the pursuer had elected to take compensation under the Workmen's Compensation Act.

HELD (reversing this judgment)—that this question should be determined by proof *primo loco*.

2224.—Crossan v. Caledon Shipbuilding and Engineering Co. (1906), 43 Sc. L. R. 852; 14 S. L. T. 33—H. L.

A workman who was in receipt of compensation under a registered agreement, was induced by the insurance office and his employer to accept £20 in place of the weekly compensation by representing that their medical man had reported that he would soon be well again. He did not read the report or give it to the workman to read. As a matter of fact, the report stated that the probable duration of disability would be some months, but that progress had been so slow that no prediction could be made. The workman brought an action to have the discharge set aside on the ground of misrepresentation.

HELD (by the House of Lords, reversing the decision of the court below)—that there had been misrepresentation, and that the discharge must be set aside.

2225.—M'Guire v. Paterson & Co., [1913] S. C. 400; 50 Sc. L. R. 289; (1913) 1 S. L. T. 32; 6 B. W. C. C. 370; [1913] W. C. & I. Rep. 107—Ct. of Sess.

A workman, with the advice of his solicitor, agreed with his employers to accept a lump sum in settlement of a claim for compensation due to him in respect of injuries caused by an accident, and a memorandum of the agreement was recorded. In a subsequent action to set aside the memorandum he averred that both parties were in error as to the extent of his injuries at the time when the agreement was made, both being under the belief that he would recover in a few weeks, whereas it turned out he was permanently incapacitated.

HELD—that these averments did not disclose a relevant ground for setting aside the agreement.

An agreement between a workman and his employers for the settlement of a claim for compensation by payment of a lump sum may be an "agreement" in the sense of the Workmen's Compensation Act, 1906 (and so recordable), even though the employers dispute liability to pay compensation, if in fact they have agreed to the amount of the payment being fixed as though they were liable under the Act.

Notes.—This case is also inserted on another point under Schedule II. (9) (see case [2934]). *North British Railway v. Wood*, 18 R. (H. L.) 27, followed on the point that the averments disclosed no relevant grounds at common law for setting aside the agreement.

2226.—Dornan v. Allan & Son (1900), 3 F. 112—Ct. of Sess.

An employer tendered £2 7s. 4d. to D., a workman, who had been injured in his employment, as in full satisfaction of any claim he might have against him, stating, as was the fact, that he had obtained a report from a surgeon that D. would be fit to return to work in six weeks. D. accepted the money and granted a discharge in full. The medical opinion on which both parties relied proved to be mistaken, and D. was not able to work for more than six months.

HELD (Lord Young *diss.*)—that the above facts were not sufficient to show that the parties in entering into the agreement, were under essential error to the effect of rendering the discharge null and void.

Notes.—*Wood v. North British Railway* (1891), 18 R. (H. L.) 27, followed.

2227.—Hawkes v. Richard Coles & Sons (1910), 3 B. W. C. C. 163—C. A.

A workman was injured and claimed compensation under the Workmen's Compensation Act, 1906, making no reference to the Employers' Liability Act. Later he returned to work, and at the instance of his employers he signed a receipt for £35 "in full settlement of all claims which I may have under the Employers' Liability Act, 1880 . . . and in full discharge of all claims . . . arising out of the said accident." The actual money paid at the time was only £17 10s., and the balance which had been paid after was found as a fact to have been wages by the arbitrator in a subsequent arbitration under the Act of 1906. The employers pleaded accord and satisfaction evidenced by the receipt, and further contended that if the receipt took effect under the Act of 1906, the matter had been "settled by agreement," if under the Act of 1880, the man had "taken proceedings independently of this Act," within the meaning of s. 1, sub-s. 2 (b).

HELD—there was accord but no satisfaction, as only £17 10s. was paid as compensation and not £35; and that s. 1, sub-s. 2 (b) did not apply to the case, as no one suggested that in this case the injury was caused by the personal negligence or wilful act of the employer or of any person for whose act or default the employer was responsible.

2228.—Rosie v. McKay (No. 1) (1909), 46 Sc. L. R. 999; 2 B. W. C. C. 150—Ct. of Sess.

An injured workman received a weekly payment of compensation under the Workmen's Compensation Act, 1897, for about six months after the accident, when the payments were discontinued. The workman then brought a common law action against his employer for damages in respect of his injury, which action was dismissed on the ground that the workman had elected to take compensation under the Act. Thereafter a memorandum of agreement under the Act was recorded and the workman claimed compensation from the date when the payments were discontinued.

HELD—that the workman had acquiesced in the discontinuance of the weekly payments during the subsistence of the common law action, and that he was therefore barred from claiming compensation for the period prior to the recording of the agreement.

2229.—Dempster v. Baird, [1909] S. C. 127; 46 Sc. L. R. 119; 2 B. W. C. C. 144—Ct. of Sess.

A miner was totally incapacitated by an accident for fourteen months, during which period he was paid compensation under the Workmen's Compensation Act, 1897, at the maximum rate by agreement with his employers. Having partially recovered, he was employed by his former employers at lighter work for seven years, his average weekly earnings being less than prior to the accident, but greater than the weekly compensation he had received. During this period he repeatedly requested his employers to make up to him the deficiency in his earnings, but these requests were not complied with. At the end of the seven years he again became totally incapacitated.

HELD—that he had barred himself from claiming any compensation in respect of his partial incapacity during the seven years.

Opinion, that it was incompetent for the arbitrator to award compensation in the shape of a lump sum in respect of the partial incapacity during the preceding seven years.

Opinion reserved, as to the proper method of ascertaining the amount of compensation, assuming the workman had a good claim.

2230.—Hughes v. Vothey Valley Co. (1908), 125 L. T. Jo. 471; 1 B. W. C. C. 416—County Court.

A workman who claimed compensation from his employer was met by a printed and stamped form put in by the employers, bearing the applicant's signature, which stated that he had received the sum of £10 11s. 1d., and that he released the employers finally from all claim he might have under the Compensation Act. Argued for the workman that as the said sum of £10 11s. 1d. had been received before the agreement was entered into, there was no consideration for the agreement.

HELD—that this contention was good.

COMPENSATION AFTER UNSUCCESSFUL ACTION.

Sect. 1, sub-s. (4).—“ If, within the time hereinafter in this Act limited for taking proceedings, an action is brought to recover damages independently of this Act for injury caused by any accident, and it is determined in such action that the injury is one for which the employer is not liable in such action, but that he would have been liable to pay compensation under the provisions of this Act, the action shall be dismissed ; but the court in which the action is tried shall, if the plaintiff so choose, proceed to assess such compensation, but may deduct from such compensation all or part of the costs which, in its judgment, have been caused by the plaintiff bringing the action instead of proceeding under this Act. In any proceeding under this sub-section, when the court assesses the compensation it shall give a certificate of the compensation it has awarded and the directions it has given as to the deduction for costs, and such certificate shall have the force and effect of an award under this Act.”

The effect of this sub-section is to give to the court power, in case the plaintiff is unsuccessful in an action brought by him independently of the Act, to assess compensation in his favour, provided that the employers would have been liable to pay such compensation if proceedings had been instituted under the Act. The decisions in *Cribb v. Kynoch* [2140], and *Edwards v. Godfrey* [2141], and the other cases which have been considered under s. 1, sub-s. 2 (b), must be kept in mind when considering the meaning of this sub-section. The applicant in an unsuccessful action must apply for the assessment of compensation then and there to the court hearing the action (*Stewart or Baird v. Higginbotham* [2231]; *M’Gowan v. Smith* [2232]; *Slavin v. Train and Taylor* [2233]). It is open to an unsuccessful plaintiff in an action to call further evidence to establish his claim for compensation under the Act (*Henderson v. Glasgow Corporation* [2234]; *Baxter v. Norris* [2235]). The privilege given by this sub-section is one personal to the raiser of the action (*McGinty v. Kyle* [2236]). Where proceedings are resorted to under this sub-section the court has full power to deal with the costs of the action, and also of the proceedings for the assessment of compensation (*Cattermole v. Atlantic Transport Co.* [2237]; *M’Kenna v. United Collieries* [2238]; *Cohen v. Seabrook* [2239]; *Keane v. Nash* (No. 1) [2240]; *Skeggs v. Kean* (No. 2) [2241]). An appeal on the ground of an improper deduction of costs by the county court judge must be taken to the Court of Appeal, and not to the High Court (*Williams v. Army and Navy Auxiliary Co-operative Society* [2242]). The compensation must be assessed by the court in which the action is tried (*Greenwood v. Greenwood* [2244]; *Quinn v. John Brown & Co.* [2245]; *Ryan or Little v. MacLellan* [2144]).

2231.—Stewart or Baird v. Higginbotham (1901), 3 F. 673; 38 Sc. L. R. 479—Ct. of Sess.

An action by a widow for damages in respect of the death of her husband by accident on January 2nd, 1900, was raised within two months thereafter. The action was dismissed on June 16th, 1900, and on appeal on November 29th, 1900. On February 14th, 1901, the pursuer applied to the court for a finding that compensation would have been due under the Workmen's Compensation Act, 1897, and to assess the same in terms of s. 1, sub-s. 4 thereof. The court refused the application.

Notes.—*Per* the Lord Justice-Clerk: "I am sorry to say that I have no hesitation in holding that the court, having already pronounced a decree dismissing the action, is not now entitled under s. 1, sub-s. 4, of the Workmen's Compensation Act, 1897, to assent to this demand for an inquiry as to whether the pursuer is entitled to compensation under the provisions of the Act."

2232.—M'Gowan v. Smith, [1907] S. C. 548; 44 Sc. L. R. 384—Ct. of Sess.

On May 18th, 1906, a workman was injured in the course of his employment. He brought an action for damages, which was dismissed on February 5th, 1907. On February 19th, 1907, the workman applied to the court to remit the case to have compensation assessed under the Workmen's Compensation Act. The court refused the application on the ground that it was not made timeously.

Notes.—*Baird v. Higginbotham* [2231] followed; and see *Powell v. Main Colliery Co.* [2279].

2233.—Slavin v. Train and Taylor, [1912] S. C. 754; 49 Sc. L. R. 93; 5 B. W. C. C. 525; [1912] W. C. Rep. 167—Ct. of Sess.

A workman brought an action in the Court of Session independently of the Act, and failed. The jury having found for the defendants, the plaintiff took bill of exceptions, but the court eventually refused the bill. Upon the defendants moving the court to apply the verdict, the plaintiff asked for assessment of compensation under the Workmen's Compensation Act, 1906.

HELD—that the plaintiff was not too late, and was entitled to the assessment.

2234.—Henderson v. Glasgow Corporation (1900), 2 F. 1127; 37 Sc. L. R. 857—Ct. of Sess.

In an action at common law, and under the Employers' Liability Act, 1880, the sheriff found the averments of the pursuer to be irrelevant.

HELD—that s. 1, sub-s. 4, of the Workmen's Compensation Act 1897, applied, and that the sheriff was entitled to proceed as arbi-

trator to enquire into the facts necessary to establish liability under the Act, as well as to assess the compensation should any be found due.

HELD FURTHER—that the proper procedure in such circumstances was to dismiss the action, so far as founded on common law and under the Employer's Liability Act, 1880, reserving it as an arbitration under the Workmen's Compensation Act.

Circumstances in which held, in an arbitration under the Workmen's Compensation Act, 1897, that the question whether the accident had arisen "out of and in the course of" the workman's employment, was a question of fact and not of law, and that the arbitrator was justified in refusing to state it as a question of law for the Court of Appeal.

Notes.—*Paterson v. Caledonian Railway Co.*, 1 F. 24, distinguished.

2235.—*Baxter v. Norris* (1907), 9 W. C. C. 33—County Court.

It is open to an unsuccessful plaintiff in an action to call further evidence on his application made at the time to assess compensation, under s. 1, sub-s. 4, to prove the employer is liable to pay him compensation under the Workmen's Compensation Act, 1897.

Notes.—*Edwards v. Godfrey* [2141] and *Neale v. Electric and Ordnance Accessories Co., Ltd.* [2142] referred to.

2236.—*McGinty v. Kyle*, [1911] S. C. 589; 48 Sc. L. R. 474; 4 B. W. C. C. 389—Ct. of Sess.

The father of a deceased workman raised an action of damages against his son's employer, and, being unsuccessful, requested compensation to be assessed under the Workmen's Compensation Act, 1906. Thereafter, and when more than six months had expired since the workman's death, the mother and sisters of the deceased workman claimed compensation as dependants.

HELD—that the right given under s. 1, sub-s. 4, of the Act was a privilege personal to the raiser of the action, and that the statutory six months having expired, the mother and sisters were not entitled to claim compensation.

Opinion reserved, whether, when a family live together and some of the children work and some do not, and the workers contribute to the family purse, the result in law is that the children who do not work are dependants of those who do.

2237.—*Cattermole v. Atlantic Transport Co.*, [1902] 1 K. B. 204; 71 L. J. K. B. 173; 18 T. L. R. 102; 85 L. T. 513; 50 W. R. 129; 66 J. P. 4—C. A.

Where an action brought under the Employers' Liability Act, 1880, is dismissed, and the county court judge determines that the defendant would be liable to pay compensation under the Workmen's Compensation Act, 1897, and proceeds under s. 1, sub-s. 4, of that Act to assess such compensation, the costs of the action, including

the proceedings for the assessment of compensation, may be dealt with at the discretion of the county court judge.

Notes.—Stirling, L.J., in this case delivered a written judgment, in which the question as to the power of the county court judge to give the unsuccessful plaintiff any costs upon the assessment of compensation under s. 1, sub-s. 4, of the Act was fully considered. *Skeggs v. Keen* (No. 2) [2241] and *Edwards v. Godfrey*, [1899] 2 Q. B. 333 [2141], referred to.

2238.—*M'Kenna v. United Collieries* (1906), 8 F. 969 ; 43 Sc. L. R. 713—Ct. of Sess.

A workman brought an action at common law, alternatively under the Employers' Liability Act, 1880, for damages on account of injuries sustained by him whilst in the defendants' employment. The plaintiff did not in his action claim alternatively under the Workmen's Compensation Act, 1897, and the defendants had not admitted liability under it. The action failed, but the plaintiff asked for and was granted compensation under s. 1, sub-s. 4, of the Act of 1897. The court in its discretion deducted the costs of the trial of the action from the compensation, but gave no costs to either party for the matters subsequent to the trial.

2239.—*Cohen v. Seabrook Brothers* (1908), 25 T. L. R. 176 ; 2 B. W. C. C. 155—Div. Ct.

A workman sued his employers in the High Court for damages for injuries caused to him by the alleged negligence of the defendants. The jury having returned a verdict for the defendants, the plaintiff applied to the judge to assess compensation under the Workmen's Compensation Act, 1897.

HELD—that an award of compensation should be made, but the costs occasioned by bringing the action would be deducted from the amount payable to the workman.

2240.—*Keane v. Nash* (No. 1) (1902), 114 L. T. J. 102 ; 5 W. C. C. 53—County Court.

Where costs are to be deducted under s. 1, sub-s. 4, the registrar should tax the defendants' bill of costs, and then tax a hypothetical bill of the costs that would have been incurred if the plaintiff had proceeded under the Act of 1897. The defendants are only entitled to deduct a sum equal to the amount that the former exceeds the latter.

2241.—*Skeggs v. Keen* (No. 2) (1899), *Times*, June 19th ; 1 W. C. C. 35—C. A.

Where all the costs, with one immaterial exception, have been caused by the plaintiff having brought an unsuccessful action, it is right that he should not receive any costs in respect of the assessment of compensation under s. 1, sub-s. 4.

Quære, whether there is power to give an unsuccessful plaintiff any costs under that sub-section.

S. 1 (4). COMPENSATION AFTER UNSUCCESSFUL ACTION. 985

2242.—Williams v. Army and Navy Auxiliary Co-operative Society (1907), 23 T. L. R. 408—D.

In an action under the Employers' Liability Act, 1880, the county court judge nonsuited the plaintiff, and his decision was affirmed by the Divisional Court. The county court judge, upon the application of the plaintiff, assessed compensation under the Workmen's Compensation Act, 1897, and deducted from the amount awarded the costs incurred by the defendants in the action under the Employers' Liability Act, and in the appeal to the Divisional Court. The plaintiff appealed to the Divisional Court against the order as to the deduction of the costs.

HELD—that the appeal lay to the Court of Appeal under Schedule II., par. 4, to the Workmen's Compensation Act, 1897.

2243.—Keane v. Nash (1903), (No. 2) 88 L. T. 790 ; 19 T. L. R. 419—C. A.

An appeal will not lie to the Court of Appeal from the refusal of a county court judge to direct a review of the taxation of costs under an order made under s. 1, sub-s. 4, of the Workmen's Compensation Act, 1897.

Notes.—See Schedule II. (4), sub tit. "Appeals," and note to *Kniveton v. Northern Employers Mutual Indemnity Co.* [2378]; *Leech v. Life and Health Assurance Association*, [1901] 1 K. B. 707 [2856], followed.

2244.—Greenwood v. Greenwood (1908), 97 L. T. R. 771 ; 24 T. L. R. 24 ; 1 B. W. C. C. 247—Div. Ct.

The plaintiff was successful in an action under the Employers' Liability Act in the county court, but the judgment was reversed in the Divisional Court. On an application made to the Divisional Court to assess compensation under s. 1, sub-s. 4, of the Workmen's Compensation Act, 1906, it was held that the application must be made to the county court in which the action was tried.

2245.—Quinn v. Brown (1906), 8 F. 855 ; 43 Sc. L. R. 643—Ct. of Sess.

In an action for damages for personal injuries the sheriff-substitute found for the defendants. The plaintiff appealed. The court having decided against the plaintiff, and being about to dismiss the action, the plaintiff, under s. 1, sub-s. 4, of the Workmen's Compensation Act, 1897, moved the court to assess compensation under that Act. The court dismissed the action, and remitted to the sheriff to assess compensation.

See also *Ryan or Little v. McLellan* [2144].

“Proceedings for Fines under the Factory Acts, etc.”

Sect. 1, sub-s. (5).—“Nothing in this Act shall affect any proceeding for a fine under the enactments relating to mines, factories, or workshops, or the application of any such fine.”

[The provisions relating to fines which are applicable are contained in the Factory and Workshop Act, 1901, s. 136; Coal Mines Act, 1911, s. 105; Metalliferous Mines Regulation Act, 1872, s. 38. See also *Lees and Sykes v. Dunkerley Brothers* [2384].]

TIME FOR TAKING PROCEEDINGS.

Sect. 2.—(1) Proceedings for the recovery under this Act of compensation for an injury shall not be maintainable unless notice of the accident has been given as soon as practicable after the happening thereof and before the workman has voluntarily left the employment in which he was injured, and unless the claim for compensation with respect to such accident has been made within six months from the occurrence of the accident causing the injury, or, in case of death, within six months from the time of death :

Provided always that—

- (a) The want of or any defect or inaccuracy in such notice shall not be a bar to the maintenance of such proceedings if it is found in the proceedings for settling the claim that the employer is not, or would not, if a notice or an amended notice were then given and the hearing postponed, be prejudiced in his defence by the want, defect, or inaccuracy, or that such want, defect, or inaccuracy was occasioned by mistake, absence from the United Kingdom, or other reasonable cause ; and
- (b) The failure to make a claim within the period above-specified shall not be a bar to the maintenance of such proceedings if it is found that the failure was occasioned by mistake, absence from the United Kingdom, or other reasonable cause.

(2) Notice in respect of an injury under this Act shall give the name and address of the person injured, and shall state in ordinary language the cause of the injury and the date at which the accident happened, and shall be served on the employer, or, if there is more than one employer, upon one of such employers.

(3) The notice may be served by delivering the same at, or sending it by post in a registered letter addressed to, the residence or place of business of the person on whom it is to be served.

(4) Where the employer is a body of persons, corporate or unincorporate, the notice may also be served by delivering the same at, or by sending it by post in a registered letter addressed to, the employer at the office, or, if there be more than one office, any one of the offices of such body.

Time for Taking Proceedings.

This section prescribes two conditions precedent to the right to recover compensation under the Act, for it is necessary that "notice of the accident" should be given as soon as practicable after the happening thereof, and that "the claim for compensation" should, subject to certain provisions, be made within six months of the accident causing the injury, or, in case of death, within six months from the time of death.

Firstly, as to the notice of accident. This must be given in writing (*Hughes v. Coed Talon Colliery Co.* [2246]; *Brady v. Canadian Pacific Railway* [2247]), but an employer may waive his right to written notice (*Davies v. Point Ayr Collieries* [2248]). Particulars of an accident entered by a manager in a book provided for that purpose, in the presence of the workman, by whom the particulars are given, will be sufficient written notice (*Stevens v. Insoles, Ltd.* [2249]). The statutory notice prescribed by sub-s. 2 of s. 2 must be served on the employer, and a verbal notice, to enable the applicant to prove that the employer has not been prejudiced by want of statutory notice, must be given to the employer or some one who has power to accept notice on his behalf (*Jackson v. Vickers, Ltd.* [2250]; *Ralph v. Mitchell* [2251]; *Griffiths v. Atkinson* [2252]). Whether a notice has been given "as soon as practicable" is a question of fact. A delay of one month (*Leach v. Hickson* [2253]) and a delay of two months (*Burrell v. Holloway Brothers* [2254]) have been held to prejudice the employer.

The *onus* of proving that the employer has not been prejudiced lies on the workman (*Hughes v. Coed Talon Colliery Co.* [2246]; *Murphy v. Shirebrook Colliery, Ltd.* [2256]), but in *Shearer v. Miller* [2255] Lord Adam said that very slight evidence would be sufficient to shift the *onus* on to the employer. The question of prejudice is purely one of fact to be determined on the evidence in each case (*M'Lean v. Carse and Holmes* [2257]; *Butt v. Gellyceidrim Colliery Co.* [2258]; *Stinton v. Brandon Gas Co.* [2259]; *Sanderson v. Parkinson & Sons* [2260]; *Hancock v. British Westinghouse Electric Co.* [2261]; *Stronge v. Hazlett* [2262]; *Shannon v. Banbridge Weaving Co.* [2265]). But although the court should be astute to require notice speedily, and should also be astute on the question whether the employer has been prejudiced or not, this principle will not apply to cases where the *bona fides* of the claim is beyond dispute and the ailment is one which does not make itself manifest immediately (*Eaton v. Evans* [2266]). If the arbitrator leaves undecided the question of want of notice, a new trial will be ordered (*Silk v. Isle of Thanet Rural Council* [2267]).

If the want, defect, or inaccuracy in the notice is due to mistake, absence from the United Kingdom, or other reasonable cause, it will not be a bar to the maintenance of proceedings (s. 2, sub-s. 1 (a)). Ignorance on the part of a workman of the existence of the Act, or of its provisions will not amount to such "mistake" or "reasonable cause" (*Bramley v. Evans* [2268]; *Roles v. Pascall* [2269]). Belief that the injury is only of a temporary character is a good excuse for

not giving notice (*Hoare v. Arding and Hobbs* [2270]; *Breakwell v. Clee Hill Granite Co.* [2271]; *Millar v. Refuge Assurance Co.* [2272]), or that it is only trivial (*Rankine v. Alloa Coal Co.* [2273]; *Ellis v. Fairfield Shipbuilding and Engineering Co.* [2274]; *Brown v. Lochgelly Iron and Coal Co.* [2275]). The same principle applies if the injury was not apparent at the time it was received (*Tibbs v. Watts, Blake, Bearne & Co.* [2276]; *Fry v. Cheltenham Corporation* [2277]. Compare *Webster v. Cohen* [2278]; see also cases, sub tit. "Claim for Compensation," (3) "Mistake or other Reasonable Cause").

Secondly, as to the claim for compensation. The "claim for compensation" means, not the initiation of proceedings before the tribunal by which the compensation is to be assessed, but a notice of a claim for compensation sent to the employer (*Powell v. Main Colliery Co.* [2279]). It is not necessary to specify the amount claimed (*Thompson v. Gould* [2280]). This decision of the House of Lords overrules *Bennett v. Wordie* [2281]; *Kilpatrick v. Wemyss Coal Co.* [2282]; *Maver v. Park* [2283]; *Marno v. Workman, Clark & Co.* [2284] on this point. But *Bennett v. Wordie* and *Marno v. Workman, Clark & Co.* may still be good law in so far as they establish that a mere notice of intention to make a claim is not sufficient. It would appear that the claim need not be in writing (*Lowe v. Myers* [2285]); but although it need not be made in any formal mode it must be made in some definite form or other (*Johnson v. Wooton* [2286]). A mere notice of accident is not a claim (*Perry v. Clements* [2287]), but an application for arbitration is a claim (*Fraser v. Great North of Scotland Railway* [2288]). The onus of proving that the claim was made within the six months lies on the applicant (*Roberts v. Crystal Palace Football Club* [2289]).

The provision that the claim must be made within six months of the accident or death is not necessarily an absolute bar to proceedings under the Act, for the arbitrator has power to enquire whether there are any circumstances which will estop the employer raising this defence (*Wright v. Bagnall* [2290]; *Heaton v. Tomlinson & Son* [2291]), but the payment by the employer of the maximum weekly payments which the workman could have recovered under the Act does not constitute an admission of liability by the employer (*Rendall v. Hills' Dry Docks and Engineering Co.* [2294]; *O'Neill v. Motherwell* [2295]). These cases were decided under the Act of 1897, and are now of little value, for the failure to make a claim under the circumstances mentioned would most probably be held to be due to a "reasonable cause" within the meaning of s. 2, sub-s. 1 (b), of the Act of 1906 (see also *Healey v. Galloway* [2296] on this point). In dealing with the computation of the period the court will not be concerned with the question of what happens inside a day (*Peggie v. Wemyss Coal Co.* [2297]).

Sect. 2, sub-s. 1 (b), provides that the failure to make a claim within the specified period shall not be a bar to proceedings if it is due to "mistake, absence from the United Kingdom, or other reasonable cause." Ignorance of the existence of the Act is no excuse (*Judd v. Metropolitan Asylums Board* [2298]; *Melville v. M'Carthy* [2299]). The question is purely one of fact to be determined on the circumstances of each case (*Devons v. Anderson* [2300]; *Egerton v. Moore* [2301]; *Dight v. S.S. Craster Hall (Owners)*

[2302]). In the case of an industrial disease it may not be possible to apply the provision that the claim must be made within six months, as the certificate of the certifying doctor, which alone determines the date of the accident, may fix it more than six months back (*Moore v. Naval Colliery Co.* [2303]; see also cases sub tit. "Notice of Accident," (3). "Mistake or other Reasonable Cause"). The cases are divided as follows:—

I. Notice of Accident.

- (1) General Principles.
- (2) Prejudice to Employer.
- (3) Mistake or other Reasonable Cause.

II. Claim for Compensation.

- (1) General Principles.
- (2) Failure to make a Claim within the proper Time.
- (3) Mistake or other Reasonable Cause.

*I. Notice of Accident.**(1) General Principles.*

2246.—Hughes v. Coed Talon Colliery Co., [1909] 1 K. B. 957; 78 L. J. K. B. 539; 100 L. T. 555—C. A.

The “notice of the accident” required by s. 2, sub-s. 1, of the Workmen’s Compensation Act, 1906, must be a notice in writing.

HELD, FURTHER—that under proviso (a) of sub-s. 1 the *onus* is on the workman of showing that his employer has not been “prejudiced in his defence by the want, defect or inaccuracy” of any such notice.

Notes.—In his judgment Cozens-Hardy, M.R., said: “Now the language of s. 2 of this Act was for all practical purposes identical—I think it is really identical—with the language of s. 4 of the Employers’ Liability Act, 1880. I do not read the sections because they are identical, and the Court of Appeal, in *Keen v. Millwall Dock Co.* (1882), 8 Q. B. D. 482 [3224], held that a notice of accident, or notice of injury as it was there called, must be in writing. I should have come, I think, to the same conclusion from the mere consideration of the language of s. 2 itself.” After considering the facts of the case the Master of the Rolls continued: “In those circumstances I think it would be doing a gross wrong to the employers to say that they ought to be made liable in respect of an alleged accident (the occurrence of which is open to very grave doubt on other grounds) which they have not now and cannot possibly have the same means of investigating and dealing with as if they had been informed in January, the date of the alleged accident, of what had taken place . . . I cannot come to any other conclusion than that this is a case in which the workman has failed to give the proper notice, and has also failed to establish that, the *onus* of which lies upon him, the employer has not been prejudiced by the failure to give due notice of the date and nature of the accident.”

2247.—Brady v. Canadian Pacific Railway, [1913] W. C. & I. Rep. 479; 6 B. W. C. C. 680—C. A.

The notice of an accident that a workman is required by s. 2 of the Workmen’s Compensation Act, 1906, to give to his employer “as soon as practicable,” in order that proceedings for compensation may be maintainable, must be in writing.

2248.—Davies v. Point Ayr Collieries (1909), 2 B. W. C. C. 157—C. A.

An employer may waive his right to notice in writing of the accident by the workman, and such right will, in fact, be waived, where, after verbal notice, the employer pays and the workman accepts a weekly payment during incapacity.

2249.—*Stevens v. Insoles, Ltd.*, [1912] 1 K. B. 36 ; 81 L. J. K. B. 47 ; 105 L. T. 617 ; 5 B. W. C. C. 164 ; [1912] W. C. Rep. 111—C. A.

Particulars of an accident to a workman arising out of and in the course of his employment entered by the employers' manager in a book which the employers have provided him for that purpose in the presence of the workman and of his father, by whom the particulars were given, constitute a "notice" sufficient to satisfy the terms of s. 2 of the Workmen's Compensation Act, 1906.

Notes.—In his judgment Cozens-Hardy, M.R., said : " If these particulars had been written by the father or by the boy in his own handwriting in this book, the case would not have been arguable. It would not make any difference if instead of being written by the father or by the boy himself it was written in their presence by the manager to whom they gave the particulars, and it, in fact, was a mere record of the particulars which they gave. I therefore think there was written notice amply to satisfy the requirements of the Act."

2250.—*Jackson v. Vickers, Ltd.* (1912), 5 B. W. C. C. 433 ; [1912] W. C. Rep. 274—C. A.

An injured workman informed a measurer of the accident at the time it happened, but did not give his employers notice until four months later, when he was cured. The employers did not know of the accident until then. The county court judge found that the measurer was a proper person to receive verbal notice of the accident on behalf of his employers, and that the employers were not prejudiced by the delay in written notice.

HELD—that there was no evidence to support the findings.

Notes.—See also *Hewitt v. Stanley Brothers, Ltd.* [1913] W. C. & I. Rep. 495 [1919].

2251.—*Ralph v. Mitchell*, [1913] W. C. & I. Rep. 501 ; 6 B. W. C. C. 678—C. A.

On November 28th, 1912, a workman was injured by an accident in his employment. He informed the manager of his injury directly afterwards. He was given half wages for some time, the employer alleged, as a loan. He did not give written notice of the accident to his employer until April 1st, 1913.

HELD—that the employer had not been "prejudiced in his defence" by the want of notice within s. 2, sub-s. 1 (a), of the Workmen's Compensation Act, 1906.

2252.—*Griffiths v. Atkinson* (1912), 106 L. T. 852 ; 5 B. W. C. C. 345 ; [1912] W. C. Rep. 277—C. A.

A. was building some houses and entered into a contract with B. under which B. was to do a certain part of the work. A workman employed by B. met with an accident. The workman gave verbal

notice to B. expecting he would inform A., but he did not do so, and A. received no notice of the accident, until more than four months after it happened, when the workman served him with a formal notice of it. The county court judge held that A. was prejudiced by want of notice at an earlier date.

HELD—that the expectation of the workman that B. would inform A. of the accident did not amount to a “mistake” within s. 2, sub-s. 1 (a), of the Workmen’s Compensation Act, 1906, and therefore that the workman could make no claim against A.

2253.—Leach v. Hickson (1911), 4 B. W. C. C. 153—C. A.

A workman was injured on July 12th. He saw his employer the same evening, but did not mention the accident. He alleged that on the following day he sent notice by messenger. On July 23rd he again saw his employer, but said nothing about compensation. He alleged that on August 6th he again sent notice by registered post. On August 12th a solicitor sent formal notice on his behalf. The employer denied having received any but the last notice. The county court judge found that notice of the accident had not been given as soon as practicable after the happening thereof, and that it had not been established that the employer had not been prejudiced by the delay.

HELD—that there was evidence to support the finding.

2254.—Burrell v. Holloway Brothers (London), Ltd. (1911), 4 B. W. C. C. 239—C. A.

A workman claimed that he had sprained his ankle at work. He said nothing at the time and walked home. He alleged that he had sent notice the next day to the foreman carpenter under whom he worked; this the latter denied. The job finished on the day of the accident, and all the men were paid off. Formal notice was given two months later. The county court judge found that, though the notice had not been given as soon as practicable, the employers were not prejudiced by the delay.

HELD—that there was no evidence to support the finding.

Notes.—In his judgment Cozens-Hardy, M.R., said: “The work was nearly at an end, and the men were being dismissed from the job. Every opportunity of challenging or testing the statement as to the source of the accident, the place where it happened, and the circumstances under which it happened, had been, I might almost say, lost to the employers by the delay.”

(2) *Prejudice to Employer.*

2255.—Shearer v. Miller (1899), 2 F. 114; 37 Sc. L. R. 80—Ct. of Sess.

In a claim for compensation under the Workmen’s Compensation Act, 1897, where no notice of the accident has been given to the employer, the *onus* of showing that the employer has not thereby

been prejudiced in his defence lies on the workman claiming the compensation.

Notes.—In this case Lord Adam said : “ The appellant by failing to give timeous notice, has barred himself from maintaining proceedings under the Act, and he can only surmount the bar by proving, either that the respondents were not prejudiced in their defence, or that the want of such notice was occasioned by mistake or other reasonable cause. But while I think that the *onus* lies, in the first instance, on the appellant I do not think that the Act contemplated separate or preliminary proceedings with the view to determining whether the employer had been prejudiced or not. . . . The claimant is put to prove a negative, and I should think that very slight evidence would be sufficient to shift the *onus* on to the employer, who certainly is in a position to prove the prejudice, if any, which he may have suffered.”

2256.—Murphy v. Shirebrook Colliery, Ltd., [1913] W. C. & I. Rep. 184 ; 6 B. W. C. C. 237—C. A.

A miner hurt his hand ; he complained to the manager the next day, but the manager was too busy to see him. He did not see the manager for a fortnight later. Compensation was refused on the ground that the injury had been increased by a fall outside a public-house on the evening of the accident. The fall was admitted, but the injury denied. Written notice was given some days later. The county court judge found that written notice had not been given as soon as practicable and the workman had not discharged the burden of proving that the employers had not been prejudiced by the delay.

HELD—that there was evidence to support the finding.

2257.—M'Lean v. Carse and Holmes (1899), 36 Sc. L. R. 678 ; 1 F. 878.—Ct. of Sess.

A workman did not give notice of his accident until three weeks after leaving the employment in which he met with the accident. The sheriff-substitute held that the employer was necessarily prejudiced by such lapse of time, and dismissed the application for compensation.

HELD—that the question of prejudice is one of fact to be determined on the evidence in each particular case, and that the case should be remitted to the sheriff to proceed.

Notes.—In his judgment Lord Adam said : “ The sheriff has laid down as law that in every case where there has been a delay of three weeks in giving notice, it necessarily follows that the employer is prejudiced. That seems to me to be his *ratio decidendi*, and it is not good law.”

2258.—Butt v. Gellyceidrim Colliery Co., Ltd. (1909), 3 B. W. C. C. 44—C. A.

A workman (an ostler) was injured after working for eight days, and as a result he was away from work for two or three weeks, and

a year and a half later he died from the effects of the accident. He gave no written notice of the accident. A cashier of the employers knew of the accident shortly after it occurred, visited the workman when he was ill at his home, paid him full wages when he was away—a strike was in progress—and appointed and paid a substitute for that period.

HELD—that verbal notice to the cashier was notice to the employers, and there was evidence that the employers were not prejudiced in their defence by the want of written notice of the accident.

The inability of the employers to give notice to their insurance company within the time specified in the policy is not relevant, as it does not prejudice their defence to the workman's claim.

Notes.—*Hughes v. Coed Talon Colliery Co.*, [1909] 1 K. B. 957 [2246], referred to.

2259.—*Stinton v. Brandon Gas Co., Ltd.* (1912), 5 B. W. C. C. 426; [1912] W. C. Rep. 132—C. A.

A workman dropped a heavy weight on to his foot, on July 27th, 1910. He went on working for two days, and then knocked off for a week on account of the pain in his foot. He returned and worked till September 14th, when he had to give up work altogether. It was found that he had gangrene in the foot, and on October 19th he was sent to a hospital, where some weeks later his leg was amputated. No statutory notice was given to the company. The secretary of the company paid the man full wages, 30s. for the first week after he finally stopped work, 20s. for the second week, and 10s. subsequently, and was given full information of the man's progress. The county court judge found that the employers knew of the injury as soon as was practicable after the happening thereof, that they had not been prejudiced by want of statutory notice, and that there was reasonable cause for not giving it. He awarded full compensation.

HELD—that there was evidence to support the finding.

2260.—*Sanderson v. J. Parkinson & Sons (Blackpool), Ltd.*, [1913] W. C. & I. Rep. 599; 6 B. W. C. C. 648—C. A.

A youth employed as a plumber and painter left work on July 25th, 1912, complaining of being ill. He went home, saw a doctor, and was kept in bed until December 13th, suffering from lead poisoning. He was told by the doctor not to worry about notice. On December 13th he saw his employers' secretary, to whom he made a statement as to the cause of the disablement, the statement being then taken down in writing. On February 13th, 1913, he got a certificate of disablement from the certifying surgeon. Between December 13th and February 13th he was in very bad health.

HELD—that the notice of accident was given as soon as practicable after the happening thereof, and that in any case failure to give notice (if any) did not prejudice the employers in their defence.

2261.—*Hancock v. British Westinghouse Electric Co.* (1910), 3 B. W. C. C. 210—C. A.

A workman was discharged from his employment on October 2nd, 1909. On October 11th he saw a doctor, and was found to be suffering from rupture. On October 13th he gave his employers written notice of an accident which he said had occurred on July 14th, 1909, and on October 22nd he was examined by the employers' doctor in the presence of his own. The man's doctors admitted that it was possible that the rupture commenced at some date earlier than July 14th. The workman had not given to the employers written notice of the accident before October 13th, but it appeared that he had complained to a man under the foreman, the "leading hand" from whom he took orders, that he had "strained himself."

HELD—that there was no evidence to justify the county court judge's finding that the employers were not prejudiced in their defence by the want of notice.

2262.—*Stronge v. J. and J. Hazlett, Ltd.* (1909), 44 Ir. L. T. 10 ; 3 B. W. C. C. 581—C. A. (Ir.).

An applicant for compensation under the Workmen's Compensation Act, 1906, met with an accident on December 15th, 1908, and did not return to work after December 24th, but the notice prescribed by s. 2 of the Act was not served until April 9th, 1909. The applicant's foot had to be amputated, as tuberculosis was present in the joint, but according to the medical evidence for the respondents, the tuberculosis could have been developed without any accident, and, owing to the length of time that had elapsed since the accident, it was not possible to say whether it was due to disease or accident.

HELD—that the notice was not given in time, and that, as the employers were, in consequence, prejudiced in their defence, the applicant's claim failed.

2263.—*Snelling v. Norton Hill Colliery Co.*, [1913] W. C. & I. Rep. 497 ; 109 L. T. 81 ; 6 B. W. C. C. 506—C. A.

If a workman who has been injured by "accident arising out of and in the course of" his employment, within the meaning of s. 1 of the Workmen's Compensation Act, 1906, has reason to believe that, although he is apparently well, the accident may be attended with serious consequences, then he must give notice to his employer "as soon as practicable after the happening thereof," as required by s. 2, sub-s. 1, of the Act. But it is not necessary for such notice to be given by every workman who has suffered some slight injury, such as a scratch on his finger. Where, however, a workman sustained what was apparently only an abrasion on the palm of his hand, but although his hand gradually got worse, he continued working at his employment for some days after the happening of the accident and he delayed in giving notice thereof to his employers until he was found to be suffering from septic poisoning, it was held that in the circumstances of the case the learned county court judge had come to a

perfectly right conclusion in deciding that the delay was not brought within the exception "mistake or other reasonable cause," and that the employers were thereby "prejudiced in their defence."

Notes.—The county court judge in this case omitted the words "in his defence" after the words "had not been prejudiced." Cozens-Hardy, M.R., in referring to the omission said: "The decision of this court in *Butt v. Gellyceidrim Colliery Co.* [2258] shows the importance of these words, but I think the county court judge has used merely an elliptical phrase, and he intended to cover the full language of the section. I think it is not fair to the learned judge to say that the root and guiding principle of his judgment is to be found in the omission of the words 'in his defence.'"

2264.—*Barker v. Holmes* (1904), 117 L. T. J. 158; 6 B. W. C. C. 52—County Court.

An employer who has, through delay in giving notice of accident, lost his right of indemnity against an insurance company is thereby prejudiced in his defence.

Notes.—It is submitted that this decision is not good law. See *Butt v. Gellyceidrim Colliery Co., Ltd.* [2258].

2265.—*Shannon v. Banbridge Weaving Co.* (1910), 45 Ir. L. T. 74 C. A. (Ir.).

A workman who had been suffering from, and had been medically treated for, lumbago met with an accident on May 30th, 1910, and on September 2nd was again treated for lumbago which might have been due to the accident. Notice of the accident was not sent to the employers until November 18th, 1910.

HELD—that as there was no mistake in the mind of the applicant about the accident, the failure to give notice of it as soon as practicable after the happening thereof could not be excused as due to "mistake," and, further, that owing to the interval allowed to elapse between the accident and the date of the notice the employers would be prejudiced in their defence if the applicant were allowed to proceed with his claim.

2266.—*Eaton v. Evans* (1911), 5 B. W. C. C. 82—C. A.

A waitress was injured by accident in June, 1910. She told her employer the same day. No effects of the accident were apparent until she fell ill in August, and she did not know until November that the illness was an effect of the accident. Notice under the Act was not given until November or December, 1910. The county court judge found that the employers were not prejudiced by the delay.

HELD—there was evidence to support the finding.

Notes.—In his judgment Cozens-Hardy, M.R., said: "I have said more than once, that where there is a possible doubt of an accident at all the court should be astute to require notice speedily, and should also be astute on the question whether the employer has

been prejudiced or not. That was the case of *Hughes v. Coed Talon Colliery Co.*, [1909] 1 K. B. 957 [2246]. That must not be taken to lay down any principle of law applicable to a case where the *bona fides* of the claim is absolutely beyond dispute, where the fact of there having been an accident has been proved to the satisfaction of the county court judge, and where the ailment from which the applicant is suffering is one which does not make itself manifest immediately."

2267.—*Silk v. Isle of Thanet Rural Council*, [1913] W. C. & I. Rep. 647; 6 B. W. C. C. 539—C. A.

A workman alleged that his eye had been injured by accident in his employment. About a month after he had left the employment the eye suddenly became inflamed. He went into hospital, and the eye had to be removed. No written notice of the accident was given to his employers until three weeks after the operation. Upon a claim for compensation by the workman the county court judge held that the injury was not caused by accident arising out of and in the course of the employment, but he left undecided the question as to want of notice.

HELD—that the case must be remitted to the county court judge for a new trial, as the question of notice had not been determined by him.

(3) *Mistake or other Reasonable Cause.*

2268.—*Bramley v. Evans & Sons* (1909), 3 B. W. C. C. 34—C. A.

A workman who had been injured by accident did not give written notice thereof for over four months, alleging as his excuse that he did not know the law. The county court judge found that the employers were prejudiced by no notice having been given, and that ignorance of the law was not a "mistake" within the meaning of s. 2, sub-s. 1 (*a*), of the Workmen's Compensation Act, 1906.

HELD—that ignorance of law is no "mistake" within the meaning of the section, and that there was ample evidence on which the judge could find that the employer was prejudiced.

2269.—*Roles v. Pascall & Sons*, [1911] 1 K. B. 982; 80 L. J. K. B. 728; 104 L. T. 298; 4 B. W. C. C. 148—C. A.

Ignorance on the part of a workman of the existence of the Workmen's Compensation Act, 1906, and of any right to compensation for an accident arising out of his employment, is not a "mistake" nor a "reasonable cause" for not giving notice of an accident within the meaning of s. 2 of the Act. .

Notes.—In his judgment Cozens-Hardy, M.R., said: "In my opinion, we should be, in fact, really repealing the six months' period of limitation, which is distinctly imposed by the Act, if we were to say that any person could escape from that and bring his claim any time afterwards if he could prove that he had never heard of the existence of the Act, or did not know anything about its contents."

Bramley v. Evans & Sons [2268] referred to.

2270.—Hoare v. Arding and Hobbs (1911), 5 B. W. C. C. 36—C. A.

A saleswoman in a shop received a shock from a fire which burnt part of the shop. Thinking she was only suffering from temporary nervous derangement she gave her employers no notice of accident, and made no claim for compensation. More than six months after the accident, it was discovered that she was suffering from a serious nervous disease. Some time after this, notice and claim were for the first time given and made. The county court judge found that the delay was due to reasonable cause, and that the employers were not prejudiced by the delay.

HELD—that there was evidence to support the findings.

2271.—Breakwell v. Clee Hill Granite Co., Ltd. (1911), 5 B. W. C. C. 133—C. A.

An elderly cripple met with an accident. He gave no notice to his employers, not knowing that he had permanently overstrained his diseased heart, and fearing that, if he obtained compensation, the insurance company would prevent his being taken back to work on recovery, and intending not to claim compensation if he recovered quickly. Four months after the accident, he learnt for the first time that he was incapacitated for life, and he thereupon gave notice and brought proceedings.

HELD—that the delay was due to reasonable cause within s. 2 of the Workmen's Compensation Act, 1906.

2272.—Millar v. Refuge Assurance Co., Ltd., [1912] S. C. 37 ; 49 Sc. L. R. 67 ; 5 B. W. C. C. 522—Ct. of Sess.

On May 9th, 1910, an insurance agent, while employed in collecting premiums, fell down a stair and sustained injuries to his left side, shoulder, and arm. He gave no formal notice, as he thought his injuries were of a temporary character, but a day or two after the accident, and again on June 8th, 1910, he gave a verbal notice of the accident to his employers' manager, and on June 29th, 1910, he left his situation. His injuries having subsequently become worse, and resulted in his complete incapacity for work, his agent, on September 12th, 1910, gave formal notice of the accident.

HELD—that the delay in giving notice was due to a "reasonable cause" within the meaning of s. 2, sub-s. 1, of the Workmen's Compensation Act, 1906, and was not a bar to proceedings under the Act.

Notes.—This case is also noted *ante* [2037].

2273.—Rankine v. Alloa Coal Co. (1904), 6 F. 375 ; 41 Sc. L. R. 306—Ct. of Sess.

A workman who had sustained injury in the course of his employment failed to give notice of the accident until five months thereafter, when he made a claim for compensation under the Act. The reasons for his failure to give earlier notice were that at first he did not regard his injury as so serious as his doctor's advice should have led

him to suppose, and that he did not intend to make any claim under the Act if his recovery had been as satisfactory as he expected.

HELD—that, even if the employers were prejudiced by the workman's failure to give notice earlier, the want of notice was occasioned by mistake for which there was reasonable cause, and that the workman was not precluded from obtaining compensation.

Notes.—Lord M'Laren, in his judgment, said: "If ever there was a case of honest, innocent mistake, I think it would be this, and while it may be that perhaps the appellant had realised the true nature of his illness some days before he gave notice, we are not to measure this question of notice in very nice scales." *Fenton v. Thorley*, [1903] A. C. 443 [1839], cited; see also note to *Egerton v. Moore* [2301].

2274.—*Ellis v. Fairfield Shipbuilding and Engineering Co.*, [1913] S. C. 217; [1913] W. C. & I. Rep. 88; 50 Sc. L. R. 137; 6 B. W. C. C. 308—Ct. of Sess.

In an arbitration under the Workmen's Compensation Act, 1906, the arbitrator found that the claimant alleged that he was injured by an accident on June 1st, 1911; that thereafter he suffered from pain in his neck and shoulders, which he attributed to the accident; that on August 5th he consulted a doctor, who diagnosed his trouble as, and treated him for, muscular rheumatism; that on November 11th the claimant left his employment and thereafter was treated for severe strain of the neck; that on December 13th he consulted another doctor, who told him that he was suffering from partial dislocation of the head from the spine, and advised him that his case was dangerous and required treatment in a hospital; that in January, 1912 (that is, after he had left his employment and more than six months after the accident), he for the first time gave notice of the accident to his employers and claimed compensation from them.

HELD—that as the delay in giving notice and claiming compensation was due to the workman's ignorance of the serious nature of his injury it was occasioned by "mistake or other reasonable cause" within s. 2, sub-s. 1, of the Act, and so was not a bar to the maintenance of proceedings for compensation.

Notes.—*Rankine v. Alloa Coal Co.* [2273]; *Brown v. Lochgelly Iron and Coal Co., Ltd.* [2275]; *Hoare v. Arding and Hobbs* [2270], and *Moore v. Naval Colliery Co.* [2303], followed. *Egerton v. Moore* [2301] discussed. The court in this case expressed the opinion that where an arbitrator had allowed a separate proof on preliminary defences and had issued findings thereon without having heard the case as a whole, there being no exceptional circumstances calling for the procedure followed, the arbitrator ought to have heard and disposed of the case as a whole. Observations *per* Lord Kinnear in *Rankine v. Alloa Coal Co., Ltd.* (*supra*) on this point approved.

2275.—*Brown v. Lochgelly Iron and Coal Co., Ltd.*, [1907] S. C. 198; 44 Sc. L. R. 180—Ct. of Sess.

On November 20th, 1905, a workman in the course of his employment fell and racked the muscles on his left side and over his lower

ribs. Notwithstanding medical advice to rest, he continued working till February, 1906, when he had to go to a hospital. He designedly did not give notice of his accident at the time, believing that his injuries would not keep him from work. After going to the hospital he realised that his injuries were more serious than he had thought, and on February 14th, 1906, he gave written notice of the accident to his employers.

HELD—that the delay in giving notice was due to mistake or other reasonable cause within s. 2, sub-s. 1, of the Workmen's Compensation Act, 1897, and that consequently the delay in giving notice was not a bar to proceedings under the Act.

Notes.—In this case Lord Justice-Clerk said: "I cannot help saying it is rather unfortunate that the clause has been so framed, for one can figure cases in which under the clause serious prejudice to the master might possibly arise; and therefore every case must be dealt with on its own circumstances. I can conceive of a case in which serious injury had been caused by neglect of doctor's orders, and however plucky and, in a certain sense, praiseworthy on the part of a workman it might be to continue at work, in spite of his doctor's directions, in such circumstances there might not be reasonable cause for failing to give notice. But here there is no ground in the circumstances for thinking that this was not a case of "mistake or other reasonable cause." *Rankine v. Alloa Coal Co.* [2273] followed.

2276.—*Tibbs v. Watts, Blake, Beame & Co., Ltd.* (1909), 2 B. W. C. C. 164—C. A.

Though the *onus* is upon the workman of showing that his employers are not prejudiced by want of proper notice or by his failure to make the claim within six months, yet the fact that the injury was not apparent at the time when it was received, may be a reasonable cause for the absence of such notice or claim.

2277.—*Fry v. Cheltenham Corporation*, [1911] W. N. 199; 81 L. J. K. B. 41; 105 L. T. 495; 76 J. P. 89; 28 T. L. R. 16; 56 S. J. 33; 10 L. G. R. 1; 5 B. W. C. C. 162—C. A.

A workman continued his work for about nine months after he was injured, the injury not being apparent at first. He then had to undergo an operation. He only gave notice on the day before the operation, and did not claim compensation or commence proceedings until some time later. The county court judge found that his condition was due to the accident, that the employers had not been prejudiced, and that the delay was due to reasonable cause. The employers relied upon the Public Authorities Protection Act, 1893, alleging that proceedings should have been commenced within six months of the accident.

HELD—that there was evidence upon which the county court judge could find that the delay was due to reasonable cause, and that the employers had not been prejudiced.

HELD, FURTHER—that the Public Authorities Protection Act,
18—2

1893, does not apply to proceedings under the Workmen's Compensation Act.

2278.—Webster v. Cohen, [1913] W. C. & I. Rep. 268 ; 108 L. T. 197 ; 57 S. J. 244 ; 29 T. L. R. 217 ; 6 B. W. C. C. 92—C. A.

The applicant, a salesman in the employment of the respondents, was injured on April 3rd, 1912, by falling from steps while engaged in window-dressing. He continued at work for about two months after the accident, although in continuous pain throughout that time. Ultimately he was incapacitated for work as a result of the accident, and he commenced proceedings claiming compensation under the Workmen's Compensation Act, 1906. Written notice of the accident, as required by s. 2 of the Act, was not given till June 3rd, 1912, but the county court judge held that the delay in giving notice was due to a reasonable cause, in that the applicant was able to continue to do his work and did not believe that the injury would result in his having to make a claim for compensation. The county court judge accordingly made an award in favour of the applicant. The employer appealed.

HELD (allowing the appeal)—that as this was not a case where the injury was not apparent, or a case where the injury was so trivial that it would be absurd to expect a workman to give notice of the accident, but was a case where the applicant was in daily, constant, serious pain, the county court judge was wrong in holding that the delay in giving notice of the accident was due to a reasonable cause.

Notes.—*Moore v. Naval Colliery Co.* [2303] ; *Tibbs v. Watts Blake, Beame & Co.* [2276] ; *Hoare v. Arding and Hobbs* [2270] ; *Fry v. Cheltenham Corporation* [2277] ; *Stinton v. Brandon Gas Co.* [2259] ; *Breakwell v. Clee Hill Granite Co.* [2271] ; *Millar v. Refuge Assurance Co.* [2272] ; *Griffiths v. Atkinson* [2252], and *Roles v. Pascall* [2269], referred to.

II. *Claim for Compensation.*

(1) *General Principles.*

2279.—Powell v. Main Colliery Co., [1909] A. C. 366 ; 69 L. J. Q. B. 758 ; 83 L. T. 85 ; 49 W. R. 49 ; 65 J. P. 100 ; 16 T. L. R. 466 —H. L. (E.).

The requirement of s. 2, sub-s. 1, of the Workmen's Compensation Act, 1897, that the claim for compensation is to be made within six months of the accident, means, not the initiation of proceedings before the tribunal by which the compensation is to be assessed, but a notice of a claim for compensation sent to the workman's employer.

Notes.—In this case a workman who had been injured in the course of his employment sent to his employers within six months a notice of the accident, but did not file a request for arbitration in the county court until more than six months after the accident. It was held by the Court of Appeal that "the claim for compensation" meant the initiation of proceedings before a tribunal. This decision was

reversed by the House of Lords. The judgments in this case are of great importance, as in them the meaning of the words "claim for compensation" were discussed at length.

Per the Earl of Halsbury, L.C. : "I suppose no one could reasonably doubt unless he is forced by some circumstances extrinsic to the actual words under construction, that this was a 'claim for compensation'; and it is not denied that it was made within the period limited by the Act. It was also made by the person who was alleged to have suffered, and it was served upon the person who was alleged to be liable; and the 'claim' so stated and described in the written paper was made for a definite amount in respect of an accident described by its date; and, as I say, I should think no person, unless forced to give an artificial meaning to the words of the section which I have read, could doubt that it was a 'claim for compensation.'"

Per Lord Brampton : "One may well interpret these sections to a workman injured in popular language thus : 'If you desire compensation, give notice of your injury as speedily as you can, and send in your claim within six months; try to agree with your employer, but if you fail to do so, you may then enforce your right to compensation by arbitration, but you will not be entitled to an arbitration or to insist upon compensation unless you have given your notice and claim as the statute directs you to do.'"

It would appear from the passage in the Lord Chancellor's judgment given above, and also from Lord Shand's judgment, that the claim must be specific, and that the parties, the sum demanded, and the date of the accident must be mentioned. This is not the case, for it was decided by the House of Lords in *Thompson v. Goold* [2280] that it is not necessary to specify the amount claimed.

2280.—Thompson v. Goold, [1910] A. C. 409; 79 L. J. K. B. 905; 103 L. T. 81; 54 S. J. 599; 26 T. L. R. 526—H. L. (E.).

In a claim for compensation for injury by accident under s. 2 of the Workmen's Compensation Act, 1897, which has been re-enacted in the Act of 1906, it is not necessary to specify the amount claimed.

Notes.—The decision of the House of Lords in this case overruled the cases of *Bennett v. Wordie & Co.* [2281] and *Kilpatrick v. Wemyss Coal Co.* [2282], in so far as they lay down that it is necessary to specify the amount claimed, the court in those cases proceeding on a mistaken understanding of the *dicta* in *Powell v. Main Colliery Co.* [2279]. Their Lordships referred to the decision in that case as follows :

Per Lord Atkinson : "The present point was not raised, and could not have been raised, in that case, for the simple reason that there the amount of compensation was precisely stated in the written claim; and I do not think that anything was said by any of the noble Lords who took part in the decision which, fairly construed, amounted to an expression of opinion on the point now raised."

Per Lord Shaw of Dunfermline : "It is quite true that in the course of Lord Halsbury's judgment certain reference is made, apparently with approbation, to the case of *Bennett v. Wordie*. And, there being that *obiter dictum*, in that situation the seven judges

in *Kilpatrick v. Wemyss Coal Co.* decided the question as concluded by the judgment of this House in *Powell v. Main Colliery Co.* My Lords, there was no judgment of this House in the sense accepted by the seven judges in the Court of Session; but so far has that acceptance, in a wrong sense, of the judgment in *Powell v. Main Colliery Co.*, gone, that this present case now under appeal rests very largely upon the adoption by the Court of Appeal of the views of the Scotch judges in the *Kilpatrick Case*, as to the decision in *Powell v. Main Colliery Co.*"

Per Lord Mersey: "It will be noticed that the decision [in *Kilpatrick v. Wemyss Coal Co.*] is largely based on *dicta* to be found in *Powell's Case*. . . . Those *dicta*, however, were *obiter*, and I do not think they bind your Lordships' House, even if they go to the length suggested." *Fraser v. Great North of Scotland Railway Co.* (1901), 3 F. 908 [2288], cited with approval.

2281.—Bennett v. Wordie & Co. (1899), 1 F. 855; 36 Sc. L. R. 643.

A workman was killed by accident on August 3rd, 1898. On November 7th his father, by his law agent, wrote to the deceased's employer intimating the accident to the deceased, and stating: "I am instructed by his father to intimate that he holds you liable for compensation and solatium. This notice is given in terms of the statutes."

HELD—that the letter was not a claim for compensation in the sense of the Act, but merely notice of an intention to make a claim.

Opinion (*per* the Lord Justice-Clerk and Lord Trayner): that a "claim" under the Act means a judicial claim, and is the same thing as "proceedings for the recovery of compensation," that is to say, in Scotland, a petition to the sheriff as arbitrator under the Act.

Opinion (*per* the Lord Justice-Clerk): that a "claim" in the sense of the statute means asking a particular sum as compensation for the injuries received.

Notes.—This case is overruled by *Thompson v. Goold* [2280] on the point that it is necessary to specify a particular sum in the claim for compensation but it is possibly good law in so far as it established that a bare notice of an intention to make a claim is insufficient. See also the *dicta* in *Powell v. Main Colliery Co.* [2279].

2282.—Kilpatrick v. Wemyss Coal Co., [1907] S. C. 320; 44 Sc. L. R. 255—Ct. of Sess.

A "claim for compensation" under s. 2, sub-s. 1, of the Workmen's Compensation Act, 1897, must be a claim for a specific sum, and not merely an intimation of a demand for compensation.

Notes.—The court in this case, proceeding on a mistaken understanding of the *dicta* in *Powell v. Main Colliery Co.* [2279], considered that they were bound by the decision of the House of Lords. The decision in *Thompson v. Goold & Co.* [2280] overrules this case on the point that it is necessary to specify the amount claimed.

2283.—*Maver v. Park* (1905), 8 F. 250 ; 43 Sc. L. R. 191—Ct. of Sess.

To satisfy the requirements of s. 2, sub-s. 1, of the Workmen's Compensation Act, 1897, a "claim" for compensation must be a claim for a definite and specified amount, and not merely an intimation of a demand for compensation.

Notes.—This case is overruled by the decision in *Thompson v. Goold* [2280]. *Bennett v. Wordie & Co.* [2281] followed. See the notes to *Thompson v. Goold* [2280] and *Powell v. Main Colliery Co.* [2279].

2284.—*Marno v. Workman, Clark & Co.* (1900), 33 Ir. L. T. 183 ; 34 Ir. L. T. R. 16 n. ; [1900] 2 Q. B. 149 n.—C. A. (Ir.)

"Claim" in s. 2, sub-s. 1, of the Workmen's Compensation Act means a judicial claim, and is the same thing as the proceedings for the recovery of compensation therein mentioned ; accordingly where a workman had not instituted proceedings for the recovery of compensation, nor made a claim within the meaning of the section within six months from the date of injury, he was held not entitled to an award.

Notes.—*Bennett v. Wordie & Co.* [2281] followed. The decision in this case, in so far as it conflicts with the decision in *Thompson v. Goold* [2280], is overruled by that case. It must be noted that this case was approved by Lord Halsbury, L.C., in *Powell v. Main Colliery Co.*, [1900] A. C., at p. 373 [2279], "not because there was no legal procedure, not because there was nothing which could technically be called the beginning of an action, but because there was no claim at all."

2285.—*Lowe v. Myers*, [1906] 2 K. B. 265 ; 75 L. J. K. B. 651 ; 95 L. T. 35 ; 22 T. L. R. 614—C. A.

It is not necessary that a claim for compensation by a workman under s. 2, sub-s. 1, of the Workmen's Compensation Act, 1897, should be in writing. The arbitrator under the Act may take into consideration any facts or admissions for the purpose of ascertaining whether a claim for compensation has been made within six months from the occurrence of the accident.

Notes.—*Powell v. Main Colliery Co.* [2279], referred to.

2286.—*Johnson v. Wootton* (1911), 27 T. L. R. 487 ; 4 B. W. C. C. 258—C. A.

The applicant, having been injured by accident while in the respondent's service, claimed compensation under the Workmen's Compensation Act, 1906. He did not suggest that he had himself given notice of any claim for compensation under the Act, but his wife gave evidence to the effect that she had written to the respondent each week for her husband's wages, and that the respondent had paid five weeks immediately after the accident and then stopped payment. During the sixth week she saw the respondent at his house and asked him, if he would not compensate the applicant, whether he would

compensate her and the children. He replied she was nothing to him or he to her, but he was sorry for them.

HELD—that there had been no notice of a claim for compensation under the Act, and that the applicant was therefore not entitled to an award of compensation.

Notes.—*Per Cozens-Hardy, M.R.* : “I assume in favour of the appellant that the claim need not be made in any formal mode, but it must be made in some definite form or other. The only evidence as to any claim at all having been made is a statement by the wife. The applicant himself gave evidence, but did not say a word about it . . . It seems to me that there is nothing there amounting to the making of a claim on behalf of the applicant for compensation.”

2287.—*Perry v. Clements* (1901), 49 W. R. 669 ; 17 T. L. R. 525—K. B. D.

The plaintiff, who worked for J., met with an accident caused by the negligence of a servant in the defendant's employment. Having given notice of the accident to his own employer, the plaintiff's wages were paid as before, and no further proceedings were taken by him under the Workmen's Compensation Act, 1897. In a common-law action against the defendant :

HELD—that the action was maintainable because a mere notice of an accident given under s. 2 of the Act of 1897 to the employer was not a “proceeding” within the meaning of s. 6, and did not, therefore, preclude the plaintiff from bringing an action against a person other than his employer, whose negligence caused the injury.

2288.—*Fraser v. Great North of Scotland Railway Co.* (1901), 3 F. 908 ; 38 Sc. L. R. 653—Ct. of Sess.

An application to the sheriff as arbiter under the Act to fix the compensation is itself a “claim for compensation” within the meaning of s. 2 of the 1897 Act, and if brought within six months of the accident does not require to be preceded by any other form of claim.

HELD FURTHER—that the refusal of a workman, who had sustained injuries resulting in the loss of his arm, to accept an offer made by his employers to retain him in the same employment at the same wages did not exclude his right to compensation if otherwise well founded.

Notes.—*Powell v. Main Colliery Co.*, [1900] A. C. 366 [2279], referred to.

2289.—*Roberts v. Crystal Palace Football Club, Ltd.* (1909), 3 B. W. C. C. 51—C. A.

The *onus* is upon the applicant to prove that a claim for compensation was made by him within six months of the accident, and if he does not prove this, he must then show that he comes within the proviso of s. 2, sub-s. 1 (b), of the Act.

(2) *Failure to Make a Claim within the Proper Time.*

2290.—*Wright v. Bagnall*, [1900] 2 Q. B. 240 ; 69 L. J. Q. B. 551 ; 82 L. T. 346 ; 48 W. R. 533 ; 64 J. P. 420 ; 16 T. L. R. 327—C. A.

By s. 2, sub-s. 1, of the Workmen's Compensation Act, 1897, proceedings for the recovery of compensation are not maintainable unless . . . the claim for compensation has been made within six months from the occurrence of the accident causing the injury. In proceedings by the workman under the statute.

HELD—that the employer may by his conduct preclude himself from objecting that the claim was made more than six months from the occurrence of the accident.

An agreement arrived at between the parties shortly after the accident that there is a statutory liability on the employer to pay compensation, the amount of compensation being left open for future settlement, is evidence upon which the judge or arbitrator may properly find that the employer is estopped from setting up the defence that the request for arbitration was not filed within six months of the accident.

Notes.—Decision of the Court of Appeal in *Powell v. Main Colliery Co.*, [1900] 2 Q. B. 145, since overruled in the House of Lords, [1900] A. C. 366 [2279], referred to. The case was thus decided on the assumption that “claim for compensation” meant “request for arbitration proceedings.”

2291.—*Heaton v. Tomlinson & Son* (1904), 117 L. T. J. 3—C. A.

Where the accident occurred on December 7th, 1901, and no written claim was made until November 1902, but there was evidence that within six months there had been a conversation between the applicant and respondents, in which the applicant was told not to worry about the future ; that the respondents would put forward a claim which the insurance company would satisfy if a good one :

HELD—that the workman had been lulled into security, and that the county court judge was wrong in holding that the respondents were not estopped from setting up absence of claim.

2292.—*Linklater v. Webster & Son* (1904), 117 L. T. J. 3 ; 6 W. C. C. 50—C. A.

A son claimed on behalf of his father as follows : “ I herewith beg to make a claim for compensation on behalf of my father, who was injured on your premises on the as per claim in the Employers' Liability Act.” The employers paid compensation.

HELD—that they had acted on the claim and waived any irregularity.

Notes.—In this case and in the case of *Heaton v. Tomlinson & Son* [2291] the Court of Appeal negatived the contention that a definite sum must be claimed.

2293.—*Lee v. Cortonwood Collieries Co.* (1901), *Times*, November 11th; 4 W. C. C. 32—C. A.

Where it was uncertain from the evidence, as stated before the court, whether the employers were estopped from setting up the point that no claim had been made, the case was sent back to the county court judge for a more definite ascertainment of the facts.

2294.—*Rendall v. Hill's Dry Docks and Engineering Co.*, [1900] 2 Q. B. 245; 69 L. J. Q. B. 554; 82 L. T. 521; 48 W. R. 530; 64 J. P. 451; 16 T. L. R. 368—C. A.

Where a workman has received personal injury by accident arising out of and in the course of employment to which the Workmen's Compensation Act, 1897, applies, the payment to him by the employer of the maximum weekly payment which he could have recovered under the Act, for six months after the accident, does not constitute a waiver of the provision of s. 2, sub-s. 1, of the Act, requiring a claim for compensation under the Act to be made within that time, and does not estop the employer from taking the objection that proceedings under the Act for the recovery of compensation are not maintainable by reason of the claim not having been made within the specified time.

Notes.—*Wright v. Bagnall* [2290] distinguished (*per* A. L. Smith, L.J.) on the ground that in that case "the parties had agreed that there was a statutory liability on the respondents to pay compensation, and that each of them had reserved the right to go to the court to have the amount determined." This case was decided before the decision in *Powell v. Main Colliery Co.* [2279] reached the House of Lords. It was thus based on the assumption that "claim for compensation" meant "request for arbitration proceedings."

2295.—*O'Neill v. Motherwell*, [1907] S. C. 1076; 44 Sc. L. R. 764—Ct. of Sess.

A woman who had been totally incapacitated by an accident in the course of her employment received from her employer for a period of about six months thereafter the sum of 10*s.* a week, which was 9*d.* a week in excess of the maximum under the Workmen's Compensation Act, 1897. The payments were made without anything being said as to the Act. The employer having proposed to reduce the payments to 5*s.* a week, the woman, without having made any claim to compensation under the Act within six months of the date of the accident, applied for arbitration under the Act, contending that her employer was barred from pleading the omission to make a claim within six months, in respect that the payment by him of 10*s.* a week amounted to a representation that he admitted her right to compensation under the Act.

HELD—that there was nothing in the circumstances to take the case out of the strict rule of the statute, and consequently that the application for arbitration was incompetent.

2296.—Healey v. Galloway (1907), 41 Ir. L. T. R. 5—C. A. (Ir.).

An employer who voluntarily pays wages to an injured workman will not thereby be prevented from relying on the fact that no claim for compensation was made within the time prescribed by the Act, unless the payments have been made in such a manner as to mislead the workman, and to induce him to abstain from making any claim.

2297.—Peggie v. Wemyss Coal Co., [1910] S. C. 93; 47 Sc. L. R. 149—Ct. of Sess.

A workman who was injured through an accident occurring at 11.30 a.m. on November 24th, 1908, lodged with his employers a claim for compensation under the Workmen's Compensation Act, 1906, at 5.30 p.m. on May 24th, 1909.

HELD—that the claim had been made within six months of the accident as required by s. 2, sub-s. 1, of the Act.

Notes.—The Lord President in his judgment said: "I adhere to what I said in the recent case of *Parish Council of Cavers v. Parish Council of Smailholm*, [1909] S. C. 105, where in dealing with the computation of a period, I said this: 'I do not think that the court will ever be concerned with the question of what happens inside a day; that is to say, I do not think that it will go into an inquiry as to the particular hour of the day at which the period commences and at which it ends, and in that sense, the remark *dies inceptus pro completo habetur* is applicable.'"

(3) *Mistake or other Reasonable Cause.*

2298.—Judd v. Metropolitan Asylums Board (1912), 5 B. W. C. C. 420; [1912] W. C. Rep. 220—C. A.

A housemaid injured her knee. She continued to receive her full wages for a year and seven months, being ill for a good part of the time. She was then discharged, and brought proceedings for compensation. She had made no claim for compensation, because, as the county court judge found, she did not know of the Act of Parliament.

HELD—that this was not a mistake or other reasonable cause for not making claim.

Notes.—*Roles v. Pascall & Sons*, [1911] 1 K. B. 982 [2269], followed.

2299.—Melville v. McCarthy, [1913] W. C. & I. Rep. 353; 47 Ir. L. T. 57—C. A. (Ir.)

An injured workman failed to make a claim within six months of the accident owing to his ignorance of the existence of the Workmen's Compensation Act, 1906.

HELD—that this was not a mistake or other reasonable cause within the meaning of the Act, and that he was barred from recovering compensation.

Notes.—*Roles v. Pascall & Sons*, [1911] 1 K. B. 982 [2269], followed.

2300.—*Devons v. Anderson & Sons*, [1911] S. C. 181 ; 48 Sc. L. R. 187 ; 4 B. W. C. C. 354—Ct. of Sess.

An injured workman, offered compensation under the Workmen's Compensation Act, 1906, resolved not to accept it, and instructed an agent to recover damages. This agent threatened on his behalf to raise an action at common law against his employers, and had several meetings with the agent of the insurance company which insured the employers, who was anxious to avoid litigation and to get the workman to accept compensation. Nothing, however, had been arranged, and no action had been raised by the workman, when the statutory period of six months from the accident expired. On the workman subsequently initiating proceedings under the Act, the arbitrator found that he had failed to make a claim within six months, and that there was no reasonable cause for this failure, and dismissed the application.

HELD—that there was no ground for disturbing the arbitrator's findings.

Notes.—Lord Johnston, in his judgment, said : “ There might, particularly having regard to s. 1, sub-s. 2 (b), and s. 1, sub-s. 4, where a claim for compensation under the Act is put in contrast to the taking proceedings independently of the Act, have been a fair question, whether the claim for compensation, which must be made within six months, can be anything other than the initiation of the proceedings contemplated by the Act where these prove necessary. But in view of the decision in *Powell v. Main Colliery Co.*, [1900] A. C. 366 [2279], that cannot now be maintained. Still the ‘ claim for compensation,’ however informal, is a distinct condition precedent to ‘ proceedings for the recovery under the Act of compensation.’ Now an admission by A., coupled with an offer by A., however definite, but not accepted by B., still more, as here, rejected by B., cannot possibly be construed as a claim by B.” *Thompson v. Goold* [2280], *Rendall v. Hill's Dry Docks* [2294], and *Wright v. Bagnall* [2290], referred to.

2301.—*Egerton v. Moore*, [1912] 2 K. B. 308 ; 106 L. T. 663 ; 81 L. J. K. B. 696 ; 5 B. W. C. C. 284 ; [1912] W. C. Rep. 250—C. A.

A workman who has sustained an injury of such a latent nature that he does not know for some time whether it will have any serious result may make a mistake of fact, within the meaning of “ mistake ” in the proviso to sub-s. 1 of s. 2 of the Act, in not giving notice as soon as practicable after the accident, but immediately he realises that he is suffering from some ailment upon which he may have occasion to rely as a consequence of the accident, he must give his employer notice, and his failure to do so, even though it proceed from a desire to do the best for himself or his employer, will not amount to “ mistake or other reasonable cause ” within the proviso to the sub-section.

A workman was temporarily employed as a navvy when he slipped and fell, striking his left breast with the handle of his pick. He stopped away from work for a few days and then went to work

for another employer. He stated in his evidence that the breast had given him pain on and off for the next twelve months after the accident. Six months after the accident he noticed a swelling in the breast which he attributed to the injury ; a month later a tubercular abscess formed which burst after some weeks, and he was then admitted to a hospital. Two months later he made a claim for compensation.

HELD—that there was no evidence that the employer had not been prejudiced, nor was there any mistake or reasonable cause for the delay in notice and claim.

Notes.—Observations of Lord Adam in *Rankine v. Alloa Coal Co.* 6 F. 375 [2273], relative to mistake commented upon *per* Buckley, L.J., as follows : “ There are expressions in the judgment of Lord Adam in *Rankine v. Alloa Coal Co.* which might be used to sustain an argument that the two expressions ‘to make a mistake’ and ‘to take a wrong course’ are equivalent expressions. Lord Adam said this : ‘He made a mistake, I think, in not more implicitly following the advice of his doctor.’ That is not a mistake within the Act of Parliament. . . . I do not think that ‘mistake’ in the Act of Parliament means ‘taking a wrong course.’ ” *Burrell v. Holloway Brothers*, 4 B. W. C. C. 239 [2254] ; *Roles v. Pascall & Sons*, [1911] 1 K. B. 982 [2269] ; *Hoare v. Arding and Hobbs*, 5 B. W. C. C. 36 [2270] ; *Moore v. Naval Colliery Co.* [2303] referred to.

2302.—*Dight v. S.S. Craster Hall (Owners)*, 29 T. L. R. 676 ; 6 B. W. C. C. 674 ; [1913] W. C. & I. Rep. 714—C. A.

A seaman was injured in the course of his employment in 1910, while on a ship on a voyage to a port in the United States. When he reached that port the seaman was discharged, and he spent a considerable time in hospital and convalescent homes. Ultimately, in 1912, he was sent home to England as a distressed seaman, and thereupon he made a claim for compensation in respect of the injury he had received. The employers objected that the proceedings were not maintainable because no claim for compensation had been made within six months of the accident. The county court judge held that the failure to make a claim was due to the applicant's absence from the United Kingdom, although there were at least three previous occasions on which he might have returned as a distressed seaman ; the county court judge accordingly made an award in favour of the applicant.

HELD—that it was for the county court judge to consider as a matter of fact whether the failure to make a claim was due to absence abroad, and that he was justified in coming to the conclusion at which he arrived.

2303.—*Moore v. Naval Colliery Co.*, [1912] 1 K. B. 28 ; 81 L. J. K. B. 149 ; 105 L. T. 838 ; 5 B. W. C. C. 87 ; [1912] W. C. Rep. 81—C. A.

A collier worked in the respondents' colliery up to September 3rd, 1910, when there was a strike. He had been suffering for some time

from "nystagmus," a disease of the eyes which is an "industrial disease" under the Workmen's Compensation Act, 1906, but he earned full wages up to September 3rd. He was told by the doctor that the disease could usually be cured by spending a short time above ground and in the open air. The workman, thinking the strike would give him an opportunity for getting well, did not give notice of his illness. In February, 1911, he found that he was not getting better and saw his doctor again. The doctor sent him to a specialist, and he advised him to apply to the certifying surgeon for the district. On March 7th the surgeon gave him a certificate that he was disabled by "nystagmus" and the disablement commenced on September 3rd, 1910. On March 9th the workman made a claim for compensation.

HELD—that the failure to make a claim within six months was occasioned by "a reasonable cause" within the meaning of s. 2, sub-s. 1 (b), of the Act.

Seemle, in the case of an industrial disease where the Act contemplates that the certificate which fixes the date of the disablement may go back a long time, certainly twelve months, a workman cannot be disabled from making an application after six months from that date, when the certificate may fix the date more than six months back.

Notes.—Fletcher Moulton, L.J., in his judgment, said: "One might almost have been certain that the case of industrial disease would, for the reason I have just given, afford many cases where the court would have, for the very nature of the case, to avail itself of this power of relieving from such technical breaches of the Act on the ground of reasonable cause. No better example could be given than the present case. In applications for compensation for industrial diseases the date of the accident has to be fixed by a person other than the workman, namely the certifying surgeon, and is fixed by him *ex post facto* from knowledge not necessarily in the possession of the workman at all, and most probably not in his possession before the date of the certificate."

CONTRACTING OUT.

Sect. 3.—(1) If the Registrar of Friendly Societies, after taking steps to ascertain the views of the employer and workmen, certifies that any scheme of compensation, benefit, or insurance for the workmen of an employer in any employment, whether or not such scheme includes other employers and their workmen, provides scales of compensation not less favourable to the workmen and their dependants than the corresponding scales contained in this Act, and that, where the scheme provides for contributions by the workmen, the scheme confers benefits at least equivalent to those contributions, in addition to the benefits to which the workmen would have been entitled under this Act, and that a majority (to be ascertained by ballot) of the workmen to whom the scheme is applicable are in favour of such scheme, the employer may, whilst the certificate is in force, contract with any of his workmen that the provisions of the scheme shall be substituted for the provisions of this Act, and thereupon the employer shall be liable only in accordance with the scheme, but, save as aforesaid, this Act shall apply notwithstanding any contract to the contrary made after the commencement of this Act.

(2) The Registrar may give a certificate to expire at the end of a limited period of not less than five years, and may from time to time renew with or without modifications such a certificate to expire at the end of the period for which it is renewed.

(3) No scheme shall be so certified which contains an obligation upon the workmen to join the scheme as a condition of their hiring, or which does not contain provisions enabling a workman to withdraw from the scheme.

(4) If complaint is made to the Registrar of Friendly Societies by or on behalf of the workmen of any employer that the benefits conferred by any scheme no longer conform to the conditions stated in subsection (1) of this section, or that the provisions of such scheme are being violated, or that the scheme is not being fairly administered, or that satisfactory reasons exist for revoking the certificate, the Registrar shall examine into the complaint, and, if satisfied that good cause exist for such complaint, shall, unless the cause of complaint is removed, revoke the certificate.

(5) When a certificate is revoked or expires, any moneys or securities held for the purpose of the scheme shall, after due provision has been made to discharge the liabilities already accrued, be distributed as may be arranged between the employer and workmen, or as may be determined by the Registrar of Friendly Societies in the event of a difference of opinion.

(6) Whenever a scheme has been certified as aforesaid, it shall be the duty of the employer to answer all such inquiries and to furnish all such accounts in regard to the scheme as may be made or required by the Registrar of Friendly Societies.

(7) The Chief Registrar of Friendly Societies shall include in his annual report the particulars of the proceedings of the Registrar under this Act.

(8) The Chief Registrar of Friendly Societies may make regulations for the purpose of carrying this section into effect.

Contracting Out.

The certified scheme provided in this section is the only way in which contracting out of the Act is allowed. The scheme contemplated by the Act is one entered into between a definite employer and his workmen, and not one between a number of employers in a district and all the workmen in that district (*Rees v. Owen* [2304]). The whole scheme must be certified (*Moss v. Great Eastern Railway Co.* [2305]). It was also decided in that case that a scheme for compensation certified under s. 3 of the Act of 1897, cannot, unless re-certified under the Act of 1906, apply to an accident happening after the commencement of the Act of 1906, though within the six months at the end of which the scheme is declared to be revoked by s. 15. But the Court of Session in *Wallace v. Hawthorne, Leslie & Co.* [2306] held a contrary opinion. An agreement to submit all questions of future incapacity to a medical referee, and in default of so doing to forfeit any further right to compensation, is a contracting out and invalid (*British and South American Steam Navigation Co., Ltd. v. Neil* [2307]). A re-certification under s. 15 of a scheme certified under the Act of 1897, may validly be made without a ballot of the men being taken (*Godwin v. Lords Commissioners of the Admiralty* [2308]). If a workman once comes within a scheme he is entirely outside the provisions of the Act, and the question of his employer's liability is to be determined solely by the scheme (*Horn v. Lords Commissioners of the Admiralty* [2309]; *Haworth v. Andrew Knowles & Sons, Ltd.* [2310]), but he may still proceed by action at common law to decide any question which is not determined under the scheme (*Haworth v. Andrew Knowles and Sons, Ltd. Accident Society* [2311]). To make a scheme binding on the workman the *onus* is upon the employer to show that there has been an actual contract entered into by the workman to accept the scheme (*Wilson v. Ocean Coal Co.* and *Trehame v. Ocean Coal Co.* [2312]). A contract to accept a scheme need not be in writing (*Berry v. Canteen and Mess Co-operative Society* [2313]).

2304.—Rees v. Owen (1907), 9 W. C. C. 35—Warrington, J.

The scheme referred to in s. 3 of the Workmen's Compensation Act, 1897, is one entered into between a particular employer and his workmen and not between a number of employers and workmen in a district.

2305.—Moss v. Great Eastern Railway, [1909] 2 K. B. 274; 78 L. J. K. B. 1048—C. A.

A scheme of compensation certified by the Registrar of Friendly Societies under s. 3 of the Workmen's Compensation Act, 1897, cannot, unless re-certified under the Act of 1906, apply to an accident happening after the commencement of the Act of 1906, though within the six months at the end of which the scheme is declared to be revoked by s. 15.

HELD, FURTHER—that the whole scheme must be certified.

Thus, where the scheme is certified, but rules which are not in accordance with the scheme are not certified, there will be no properly certified scheme excluding the Act.

HELD, FURTHER—that under clause 4 of Schedule II. of the Workmen's Compensation Act, 1906, an appeal now lies to the Court of Appeal from a decision by a county court judge on a preliminary question of law, or as to his jurisdiction to entertain proceedings, and not, as formerly, only after an award has been made.

2306.—Wallace v. Hawthorne, Leslie & Co., [1908] S. C. 713; 45 Sc. L. R. 547—Ct. of Sess.

The Workmen's Compensation Act, 1906, came into operation on July 1st, 1907. A workman entered an employment on August 9th, 1907, and agreed to accept a scale of compensation under a scheme certified under the Workmen's Compensation Act, 1897—the certificate bearing that the scheme was to expire on December 31st, 1908. On August 15th, 1907, when the scheme had not been re-certified under sect. 15 of the Workmen's Compensation Act, 1906, the workman was injured by an accident arising out of and in the course of his employment.

HELD—that the workman having entered on his employment after July 1st, 1907, was not barred from obtaining compensation under the Act by having agreed to accept the provisions of a scheme certified under the Act of 1897, but which had not been re-certified under the Act of 1906.

2307.—British and South American Steam Navigation Co., Ltd. v. Neil (1910), 3 B. W. C. C. 413—C. A.

An injured workman made a written agreement with his employers under which he accepted the full compensation due to him under the Act as long as he was totally disabled by the accident. He also agreed that he would submit himself under certain circumstances to the medical referee of the district in the event of any

dispute arising as to his fitness for employment, and that if he refused to assist in the application for examination by the medical referee all further rights to compensation in respect to the accident should cease.

HELD—that the penal clause at the end of the agreement was a contracting out of the Act contrary to s. 3, sub-s. 1, and was invalid.

2308.—Godwin v. Lords Commissioners of the Admiralty, [1912] 2 K. B. 26; 81 L. J. K. B. 532; 106 L. T. 136; 28 T. L. R. 229; 56 S. J. 307; 5 B. W. C. C. 229—C. A. Affirmed [1913] W. C. & I. Rep. 680; 29 T. L. R. 774; 6 B. W. C. C. 788—H. L.

A scheme under the Workmen's Compensation Act, 1897, may validly be re-certified by the Registrar of Friendly Societies under s. 15, sub-s. 3, of the Workmen's Compensation Act, 1906, notwithstanding that no ballot of the workmen affected by the scheme has been taken under s. 3, sub-s. 1, of the Act of 1906.

Notes.—*Per* Cozens-Hardy, M.R., in the Court of Appeal: "The regulations issued by the Registrar of Friendly Societies in July, 1907, in so far as they deal with s. 15 of the Workmen's Compensation Act, 1906, have no authority."

Horn v. Lords Commissioners of the Admiralty [2309] approved.

2309.—Horn v. Lords Commissioners of the Admiralty, [1911] 1 K. B. 24; 80 L. J. K. B. 278; 103 L. T. 614; 27 T. L. R. 84; 4 B. W. C. C. 1—C. A.

A workman agreed that the provisions of a duly certified scheme should be substituted for the provisions of the Workmen's Compensation Act, 1906. The workman having died from lead poisoning, his widow applied for compensation under the Act.

HELD—that the workman, having come into the scheme, was for all purposes outside the provisions of the Act, and, therefore, the applicant was not entitled to an award of compensation under the Act.

2310.—Haworth v. Andrew Knowles and Sons, Ltd. (No. 2) (1913), 29 T. L. R. 667; 57 S. J. 728; [1913] W. C. & I. Rep. 746; 6 B. W. C. C. 596—C. A.

A workman who, in 1901, became a member of an accident society, certified under s. 3 of the Act of 1897 as a scheme for contracting out of the Act for five years from 1898, shortly afterwards was permanently injured as the result of an accident. The scheme expired in 1903, when a new scheme was certified, the same funds being used. The workman did not join the new scheme, but weekly payments were continued. The new scheme was not re-certified under the Act of 1906 and was revoked in 1907. The workman still received weekly payments out of the funds until they became exhausted in 1912; he then claimed compensation under the Act.

HELD—that the employers were not liable under the Act as the workman had contracted out of the Act.

Semble, delay in making a claim would have been sufficient to avoid liability.

Notes.—*Horn v. Lords Commissioners of the Admiralty* [2309] applied. *Godwin v. Lords Commissioners of the Admiralty* [2308] referred to.

2311.—*Haworth v. Andrew Knowles and Son, Ltd., Accident Society* (1903), 19 T. L. R. 658; 5 W. C. C. 57—C. A.

Under a scheme of compensation the affairs of a society were to be managed by a committee who were empowered to stop payment of allowances should an injured member fail to go to work when told to do so. One of the rules provided that “in all cases of doubt or difference as to the construction of these rules, and in the event of any circumstance occurring which is not provided for thereby, the decision of the committee shall be conclusive and final, and there shall be no appeal therefrom.” The committee stopped the allowance which the plaintiff was receiving under the scheme on the ground that he had failed to go to work when able to do so. The plaintiff brought this action for arrears of payment.

HELD—that a court of law had jurisdiction to determine the question of fact whether the plaintiff had failed to go to work when able to do so, as the above rule was not wide enough to oust the jurisdiction of the court, and the question whether the workman had failed to go to work when able to do so was not a matter on which the decision of the committee was made final by the rules.

See also *Taylor v. Hamstead Colliery Co.*, [1904] 1 K. B. 838 [2153], sub-tit. “Option of Workman to proceed Independently of Act,” s. 1, sub-s. 2 (*b*).

2312.—*Wilson v. Ocean Coal Co. and Treharne v. Ocean Coal Co.* (1905), 21 T. L. R. 631; 7 W. C. C. 34—C. A.

A scheme of compensation was certified in 1893, as applicable to the defendants’ workmen, one of whom was the plaintiff who agreed to come in under the scheme. The scheme expired in 1903 when a renewal scheme was certified by the Registrar, and the defendants posted up a notice that workmen might enrol under the scheme. The course adopted at the defendants’ works was that a month’s notice should be given if a workman wished to withdraw from the scheme. The plaintiff had not given notice of withdrawal, but he did not enrol under the new scheme. The defendants deducted a certain amount from his wages as his contribution under the renewal scheme, upon the ground that the renewal scheme was binding upon him until he gave notice that he would not be bound by it.

HELD—that, the original scheme having expired, the workman was not bound by the renewal scheme unless the defendants proved that the workman had agreed to accept the new scheme.

2313.—*Berry v. Canteen and Mess Co-operative Society* (1910), 3 B. W. C. C. 449—C. A.

A contract to accept a scheme need not be in writing, it being a question of fact in each case for the judge to decide whether a workman has so contracted.

PRINCIPAL AND CONTRACTOR.

Sect. 4.—(1) Where any person (in this section referred to as the principal), in the course of or for the purposes of his trade or business, contracts with any other person (in this section referred to as the contractor) for the execution by or under the contractor of the whole or any part of any work undertaken by the principal, the principal shall be liable to pay to any workman employed in the execution of the work any compensation under this Act which he would have been liable to pay if that workman had been immediately employed by him; and where compensation is claimed from or proceedings are taken against the principal, then, in the application of this Act, references to the principal shall be substituted for references to the employer, except that the amount of compensation shall be calculated with reference to the earnings of the workman under the employer by whom he is immediately employed :

Provided that, where the contract relates to threshing, ploughing, or other agricultural work, and the contractor provides and uses machinery driven by mechanical power for the purpose of such work, he and he alone shall be liable under this Act to pay compensation to any workman employed by him on such work.

(2) Where the principal is liable to pay compensation under this section, he shall be entitled to be indemnified by any person who would have been liable to pay compensation to the workman independently of this section, and all questions as to the right to and amount of any such indemnity shall in default of agreement be settled by arbitration under this Act.

(3) Nothing in this section shall be construed as preventing a workman recovering compensation under this Act from the contractor instead of the principal.

(4) This section shall not apply in any case where the accident occurred elsewhere than on, or in, or about premises on which the principal has undertaken to execute the work or which are otherwise under his control or management.

Principal and Contractor.

The object of this section is to prevent an employer from contracting with someone else to provide labour or to execute work, and thus divesting himself of all responsibility in respect of injury to workmen engaged on the work which he sub-lets. At common law or under the Employers' Liability Act he would not be liable, and if the sub-contractor was a man of straw the workman would not be able to recover compensation. This section thus gives to the workman a double security, for he will be able to proceed either against his direct employer the "contractor," or against the person on whose behalf the work is being executed "the principal." There may be many "principals," for if a "contractor" lets off part of his work to another, he will become a "principal" as regards workmen employed by his sub-contractor. But any principal who is made liable under sub-s. 1, will have a right of indemnity under sub-s. 2 against any person who would be liable independently of the section. The term "sub-contracting" in the marginal note to this section is misleading, as the section is not confined to cases where there is first a contract and then a sub-contract, but it applies to cases where there is a contract only, as where a man undertakes building or other operations himself, merely contracting with another man to do a portion of it (*Skates v. Jones* [2314]; *Mulrooney v. Todd* [2315]). However, the word "principal" will usually mean "contractor," and thus the word "contractor," will usually mean "sub-contractor." The section will only apply where the following conditions are fulfilled.

(1) The contract must be for the execution of work undertaken by the principal (sub-s. 1).

(2) It must have been made in the course of or for the purposes of his trade or business (sub-s. 1).

(3) The principal will only be liable to pay compensation if the circumstances are such that he would have been liable had the injured workman been immediately employed by him (sub-s. 1).

(4) The accident must have occurred on, or in, or about premises on which the principal has undertaken to execute the work or which are otherwise under his control or management (sub-s. 4).

(5) The case must not fall within the proviso in sub-s. 1, as to threshing, ploughing, or other agricultural work for the purposes of which the contractor uses machinery driven by mechanical power.

(6) The liability of the principal and contractor is only alternative. Therefore if the applicant brings an unsuccessful action against the contractor, he cannot then sue the principal.

Firstly, the contract must be for the "execution of work undertaken by the principal." The more logical order would be to consider the meaning of these words after the meaning of the words "in the course of or for the purposes of his trade or business," but as the case of *Skates v. Jones* [2314], which we regard as the leading case on the interpretation of the section, deals principally with the construction of the words "work undertaken by the principal," we have thought it advisable to discuss the subject in this order. The section is not limited to the relationship between a contractor and a sub-contractor (*Mulrooney v. Todd* [2315]; this case was expressly

approved of in *Skates v. Jones* [2314], in which case it was held that a man may be liable as a principal if, doing work for himself within the scope of his trade or business, he contracts with another person to do part of such work). The contrary view has been expressed by the Lord President in *Zugg v. Cunningham* [2318], and by Buckley, L.J., in *Marks v. Carne* [2339]; but in the former case, Lord McLaren held the broader view which has since been adopted in *Skates v. Jones*. The decisions in *Zugg v. Cunningham* and *Walsh v. Hayes* [2317] are, it is thought, correct, except in so far as passages in the judgments limit the application of the section to the relationship between a contractor and sub-contractor. The decisions in *Dittmar v. Ship V* 593 [2319], and *Hayes v. Thompson* [2320] are in harmony with the principles established in *Mulrooney v. Todd*, and *Skates v. Jones*; but they are merely decisions on questions of fact.

Secondly, the work must have been undertaken "in course of, or for the purposes of" the principal's trade or business. "It is not everything done in the interest of the trade or business which falls within this section" (per Cozens-Hardy, M.R., in *Skates v. Jones* [2314]), it must be work done "in the course of and for the purposes of" the trade or business. If the work was merely "required" by the principal, and was not work "undertaken" by him, he will not be liable. Thus, although shipowners occasionally employ their own men to clean boilers, such work is not one of the ordinary operations of the business of a shipowner, and will not, therefore, be within the section (*Spiers v. Elderslie Steamship Co.* [2321]; *Luckwill v. Auchen Steamship Co.* [2322]). If a building contractor erects a house for himself and employs a sub-contractor to do part of the work, he will be liable as "principal" if the workmen of the sub-contractor are injured (*Stalker v. Wallace* [2324]); but if a surveyor contracts to have a house repaired and agrees to supervise the work himself, this will not be a contract "in the course of or for the purposes of" the surveyor's trade or business (*Brine v. May, Ellis, Grace & Co.* [2325]). The case of *Stalker v. Wallace* was a decision under the Act of 1897, but the principle on which it is decided is good law in the opinion of Cozens-Hardy, M.R., in *Skates v. Jones*. See also *Waites v. Franco-British Exhibition* [2326].

Under s. 4 of the Workmen's Compensation Act, 1897, if the work carried on by the contractor was "merely ancillary or incidental to," and was "no part of, or process in, the trade or business carried on" by the person employing the contractor, the contractor only would be liable. Numerous decisions were given on the meaning of the old section, which it is submitted are still applicable when deciding the question as to what is "work undertaken in the course of or for the purposes of" the principal's trade or business within the meaning of the Act of 1906 (*Burns v. North British Railway* [2327]; *Greenhill v. Caledonian Railway* [2328]; *Bee v. Ovens* [2329]; *Pearce v. London and South Western Railway* [2332], and other decisions are inserted on this point).

Thirdly, the principal is only liable as if the workman had been immediately employed by him. Thus, if the injured man is not a "workman" within the meaning of the Act as regards his immediate employer the contractor, he will not be able to claim compensation against the principal (*Marks v. Carne* [2339]).

Fourthly, the accident must have occurred "on, or in, or about premises" on which the principal has undertaken to execute the work or which are otherwise under his control or management. The meaning of the words "on, or in, or about" was definitely decided in Powell v. Brown [2341] to cover cases in which the employment is "in close propinquity to the factory," etc., the question being purely one of fact to be decided in each case. We have included a large number of cases which were decided under the Act of 1897, for although they are no longer of authority, in so far as they are based on the meaning of s. 7, sub-s. 1, of the Act of 1897, yet by analogy they may be used to determine the meaning of the words "on, or in, or about" contained in s. 4, sub-s. 4, of the Act of 1906. Thus, in Andrews v. Andrews and Mears [2340], a decision under the Act of 1906, Cozens-Hardy, M.R., remarked during the argument that the words "must be construed as they were under the old Act."

Fifthly, if the contractor provides "machinery driven by mechanical power" for the purpose of threshing, ploughing, or other agricultural work, he alone will be liable to pay compensation to any workman injured whilst employed by him on such work. The decisions in Wilmott v. Paton [2372] and the other cases mentioned explain the meaning of the corresponding portion of s. 4 of the Act of 1897.

Sixthly, the liability of the principal and contractor is only alternative and neither joint nor joint and several. Thus an award against the contractor, though partly fruitless, will be a bar to proceedings under the Act against the principal (Meier v. Dublin Corporation [2373] and Herd v. Summers [2374]). See also Workmen's Compensation Rules, 1913, rule 2 (2).

For procedure see Workmen's Compensation Rules, 1913, rules 20—24, 26, 27. The effect of the decision in *Appleby v. Horseley* (No. 2) [2375] is embodied in the last-mentioned rule.

The cases are divided up as follows :—

- I. "Work Undertaken by the Principal."
- II. "In the Course of or for the Purposes of his Trade or Business."
 - (a) General Principles.
 - (b) Cases decided under the Act of 1897 on the Question whether the work was "Merely Ancillary or Incidental to" or was "Part of" the Work of the Person employing the Contractor.
- III. Principal only liable as if workman had been immediately employed by him.
- IV. "On, or in, or about Premises."
- V. "Machinery Driven by Mechanical Power."
- VI. Alternative Liability.
- VII. Procedure.

I. "*Work Undertaken by the Principal.*"

2314.—*Skates v. Jones*, [1910] 2 K. B. 903; 79 L. J. K. B. 1168; 103 L. T. 408; 26 T. L. R. 643; 3 B. W. C. C. 460—C. A.

A person carrying on a trade or business is not liable as a principal under the Workmen's Compensation Act, 1906, if he contracts with another person to do work not within the scope of such trade or business; but he is liable as a principal if, doing work for himself within the scope of his trade or business, he contracts with another person to do part of such work, the application of the section not being confined to the case where there are two contracts—a head-contract and a sub-contract.

Three persons—two greengrocers and the keeper of a billiard saloon—engaged in a joint venture to run a skating rink in Wales. They purchased for the purpose an existing iron structure at Kingston-on-Thames and contracted with a contractor to remove and erect the structure in Wales. The applicant was employed by the contractor on this job, in the course of which he met with an accident and claimed compensation under the Workmen's Compensation Act, 1906, s. 4, against the three persons.

HELD—that they were not liable.

Per Cozens Hardy, M.R.: "This appeal involves the construction of s. 4 of the Workmen's Compensation Act, 1906. It is one of the most difficult sections of the Act, and different views have been held in Scotland and Ireland, if not also in this country.

"In substance it corresponds to s. 4 of the Act of 1897, though there are very material differences. The word 'undertaker' was a most important word in the Act of 1897 (see s. 7), but it is not found in the Act of 1906. The word 'undertaken,' which is found in s. 4, sub-ss. 1 and 4, seems to be a survival from the Act of 1897. One view, and perhaps the most natural view, of the section is that it applies only where there is a sub-contract. In the words of the Lord President in *Zugg v. J. and J. Cunningham, Ltd.*, [1908] S. C. 827 [2318]: 'To get the state of affairs contemplated by the section there must be an undertaking by A. to perform the work for B. and a sub-contract between A. and C. (whose immediate servant the workman is) to perform the work undertaken.' But in the same case Lord McLaren took a wider view and said that a company may be held to have 'undertaken' a work though it was under no contractual obligation to do so, at least where the work was of a nature which the principal professes to perform as part of his trade or business. In *Walsh v. Hayes*, 2 B. W. C. C. 202 [2317], the Court of Appeal in Ireland held that the expression 'work undertaken,' read in conjunction with the words 'in the course of or for the purposes of his trade or business,' implied some obligation on the principal to do the work, and that a farmer who contracted for the services of a threshing machine (not falling within the proviso to sub-s. 1) was not liable to pay compensation to a man injured in the course of working the machine with whom the farmer had no contractual relation. In *Spiers v. Elderslie Steamship Co., Ltd.*,

[1909] S. C. 1259 [2321], it was held by the Court of Session that shipowners who contracted for the cleaning of the boilers in one of their vessels were not liable to pay compensation to a man employed by the contractor who was injured by an accident. In the words of the Lord Justice-Clerk, 'It was part of their business to have their boilers in good condition, but not to do the operations to put them in good condition.'

"I think the application of the section cannot be limited to a case where there are two contracts, namely, a head contract and a sub-contract, although that is the common case to which the section applies. This has, in truth, been decided by this Court in *Mulrooney v. Todd*, [1909] 1 K. B. 165 [2315]. That case turned upon s. 13, which declares that the exercise and performance of the powers and duties of a local or other public authority shall 'for the purposes of this Act'—which obviously includes s. 4—be treated as the trade or business of the authority. There was a statutory duty, but no contractual obligation, binding the corporation, and we held that s. 4 applied. It seems to me that the only question open to discussion in this court is this: Was the particular work 'undertaken' 'in the course of or for the purposes of' the trade or business of the principal? It is not everything done in the interest of the trade or business which falls within this section. I shrink from saying that a cotton spinner who finds one of his boilers out of order and contracts with a boilermaker to replace it with a new boiler is liable to pay compensation to one of the workmen employed by the boilermaker. That work was required by the cotton spinner, but not 'undertaken' by him. He never held himself out as a boilermaker. It was not part of his trade or business to erect boilers, and the whole section has no application to him. If, however, a man who carries on the trade of a builder builds a house for himself, but contracts with another builder to do part of the work, I think such a case would fall within the section. This construction of the section is consistent with the views of Lord M'Laren and the Lord Justice-Clerk."

Notes.—Farwell, L.J., pointed out that there were three possible constructions of the section. The first, which was adopted by the Lord President in *Zugg v. Cunningham*, [1908] S. C. 827 [2318], being "that the section is confined to contractors in its proper sense: that is, to cases where a contractor, who has contracted to do work for another, sub-contracts with other persons to carry out part or parts of it for him." The second, which was adopted by the Irish Court of Appeal, in *Walsh v. Hayes*, 2 B. W. C. C. 202 [2317], being "that the section is not so confined, but extends also to cases in which the 'principal' has undertaken certain work on his own account, such work being such as he usually undertakes for others in the course of his own trade or business, and has employed other persons to carry out part or parts of such work for him." The third, which the counsel for the appellant in this case invited the court to adopt being that the section "includes all work undertaken by any person in the course of or for the purpose of his trade or business, whether it is in the ordinary course of such trade or business or not." The Lord Justice considered that the second construction was the

true one and said : " We are not entitled to use the marginal note as a guide to construction, and I do not rely on it ; but the section appears to me to have been originally intended to apply to the contractor who sub-lets part of his contract and then to have been developed on the basis that a contractor who does work for another on contract is in the same position towards the workman as the contractor who does the same class of work in the usual way of business for himself and sub-lets part of it, and this explains the words ' undertaken by the principal ' as including the man who undertakes in the usual course of his business to do the work, whether for himself or for another. The builder or decorator may be said to undertake the work of building or decorating a house whether he does it himself or for another ; but a banker or a grocer neither builds nor decorates as part of his trade or business, and no one would say that either of them had undertaken the building or decorating : it is the builder or decorator employed by him who undertakes the work ; the only undertaking by the banker or grocer is to pay for such work. This is shown by the words ' in the course of or for the purposes of his trade or business. ' While there is no reason for drawing a distinction between a building undertaken by a builder for himself and a building undertaken by him under contract for another, there is equally no reason for drawing a distinction between a building contracted to be done for a grocer by way of addition to his shop and a building contracted to be done for a private resident next door by way of addition to his dwelling-house ; but the words ' in the course of or for the purposes of his trade or business ' show that the private resident is not within the section. The man of business or tradesman is not made a principal because he is in business or in trade, but because the particular work in question is his own trade or business ; and this is the true construction of the section in my opinion." *Dittmar v. Ship V 593 (Owners)* [2319] also referred to.

2315.—*Mulrooney v. Todd*, [1909] 1 K. B. 165 ; 78 L. J. K. B. 145 ; 100 L. T. 99 ; 73 J. P. 73 ; 25 T. L. R. 103—C. A.

The liability of a person as principal under s. 4, sub-s. 1, of the Workmen's Compensation Act, 1906, is not confined to cases where there is first a contract and then a sub-contract, and read in conjunction with s. 13 includes the case where a local authority in the exercise of its powers contracts with a contractor for the removal of old buildings and things from land of the local authority, so that the local authority is liable as a principal to pay compensation to a workman injured in the course of his employment by the contractor under the contract, and equally so though by the terms of the contract the old buildings and things removed become the property of the contractor, so that the contract may amount to a contract for the sale of goods within the Sale of Goods Act, 1893, if it is primarily a contract for the work of removal.

Notes.—This decision was expressly approved in *Skates v. Jones* [2314]. Farwell, L.J., in his judgment said : " I agree that the powers and duties of the corporation mentioned in s. 13 include all those duties which are discretionary as well as those which are absolute."

2316.—Hardford v. County Dublin County Council (1910), 45 Ir. L. T. 150—C. A. (Ir.).

Where a county council employed one R. to quarry stones from a quarry within the county and to deliver stones of a certain quality and a certain size upon roads which the council were repairing, it being agreed that R. was to be paid at a rate per cubic foot of quarried stone so delivered, and a workman employed by R. in the quarry was injured in a premature explosion :

HELD—that the county council were liable to pay compensation to the workman.

Notes.—The liability of public authorities under ss. 4 and 13 of the Workmen's Compensation Act, 1906, considered. *Coles v. Dickinson*, 16 C. B. N. S. 604, referred to.

2317.—Walsh v. Hayes (1909), 43 I. L. T. 114; 2 B. W. C. C. 202—C. A. (Ir.).

The expression "work undertaken by the principal" contained in s. 4 of the Workmen's Compensation Act, 1906, imports some obligation on the principal to do the work.

A farmer arranged with the applicant, a young lad, for the services of a threshing machine, the machine and horses being the property of the applicant's father, who was to be paid 20*s.* out of 25*s.*, which was the sum stipulated for—and in the course of the work the applicant was injured. The county court judge found as a fact that there was no contractual relation with the applicant; that the contract was with the father, and that the applicant was merely a substitute for him.

HELD—that the applicant was not entitled to compensation under s. 4 of the Act of 1906, there being no "work undertaken by the principal" within the meaning of that section.

Notes.—The following note is contained at the end of the report, 43 I. L. T. 115: "The learned county court judge held in favour of the applicant that the threshing machine being worked by horses, was not 'machinery driven by mechanical power,' within the meaning of the proviso in s. 4, sub-s. 1. This point was not argued in the Court of Appeal, but, from some interlocutory observations, it would seem that their Lordships were inclined to think that it was 'machinery driven by mechanical power.'"

2318.—Zugg v. J. & J. Cunningham, Ltd., [1908] S. C. 827; 45 Sc. L. R. 690; 1 B. W. C. C. 257—Ct. of Sess.

A firm of chemical manufacturers contracted with a certain person to tar the outside of tanks used in their business to protect them from the weather, and a workman in the employment of the contractor was killed by an accident while engaged on the works. In a claim for compensation by the workman's widow :

HELD—that the work of tarring the tanks was not part of the work "undertaken" by the chemical manufacturers within the

meaning of s. 4, sub-s. 1, of the Workmen's Compensation Act, 1906, and that they were not liable to pay compensation.

Notes.—The view of the Lord President in this case that “to get the state of affairs contemplated by the section, there must be an undertaking by A. to perform the work for B., and a contract between A. and C. (whose immediate servant the workman is) to perform the work undertaken,” was dissented from in *Skates v. Jones* [2314], and the opinion of Lord M'Laren, that a company may be held to have “undertaken” a work though it was under no contractual obligation to do so, was adopted.

2319.—*Dittmar v. Ship V 593 (Owners)* or *Wilson*, [1909] 1 K. B. 389; 78 L. J. K. B. 523; 100 L. T. 212; 25 T. L. R. 188—C. A.

A limited company carrying on business as coal merchants and lighter men in England and elsewhere, including Cape Verd, and being expressly authorised by their memorandum of association to purchase lighters, purchased a lighter in England for use in their business at Cape Verd. By a contract made between them (therein described as “owners”) and G., the latter agreed for a certain sum to navigate the lighter from Stockton-on-Tees to Cape Verd and to deliver it to the owners there. He was to provide the crew and pay their wages and to indemnify the owners against any claims of the crew, and the owners were to pay all demands for insurance and clearances at port of departure. G. appointed B. to take command of the lighter and to find the crew. A boatswain engaged by B. was seriously injured on the lighter whilst it was off the English coast, and he applied for compensation against the owners under the Workmen's Compensation Act, 1906.

HELD—that the owners “in the course of or for the purposes of their trade or business” had contracted with G. for the execution by or under G. of part of the work proper to their undertaking, and in that sense “undertaken” by them, and were consequently liable as principals within s. 4, sub-s. 1, of the Act of 1906, and that as the accident occurred on the lighter, which was “premises” under the control or management of the owners, sub-s. 4 had no application.

Notes.—In his judgment, Cozens-Hardy, M.R., said: “I refrain from expressing any opinion as to the effect of this very difficult section where the facts may be different, and I base my decision entirely upon the very peculiar conditions of the present case.” *Andrews v. Andrews and Mears*, [1908] 2 K. B. 567 [2340], cited.

2320.—*Hayes v. S. J. Thompson & Co.* (1913), 6 B. W. C. C. 130; W. C. & I. Rep. 161—C. A.

Barge-owners employed the captain to do the annual work of overhauling the barge. The captain, who had free choice, employed the mate to help him. The mate was injured in the course of the work. The county court judge found that overhauling was no part of the trade or business of the barge-owners, and held that therefore overhauling was not “work undertaken” by them within the meaning of s. 4 of the Workmen's Compensation Act, 1906.

HELD—that there was no misdirection.

Notes.—*Mulrooney v. Todd and Bradford Corporation* [2315] and *Skates v. Jones* [2314] applied.

The following cases were decided upon the meaning of the word “undertaker,” within s. 7 of the Workmen’s Compensation Act, 1897. Although they are no longer of authority, in so far as they are based on the meaning of the word “undertaker,” they may still be of some use and so are mentioned: *Morgan v. Tydvil Engineering Co.* (1908), 98 L. T. 762; *Topping v. Rhind*, 6 F. 666; *Wagstaff v. Perks*, 87 L. T. 558; *Cooper and Crane v. Wright*, [1902] A. C. 302; *Pacific Steam Navigation v. Pugh*, 23 T. L. R. 622; *Benson v. Metropolitan Asylums Board* (1908), 124 L. T. J. 403; *McCabe v. Jopling and Palmer’s Travelling Cradle, Ltd.*, [1904] 1 K. B. 222; *Evans v. Cook*, [1905] 1 K. B. 53.

Other cases have also been reported, but after careful consideration we have decided that they are rendered obsolete by the repeal of the Act of 1897.

II. “*In the Course of or for the Purposes of his Trade or Business.*”

(a) *General Principles.*

N.B.—See *Skates v. Jones* [2314].

2321.—*Spiers v. Elderslie Steamship Co.*, [1909] S. C. 1259; 46 Sc. L. R. 893—Ct. of Sess.

Shipowners entered into a contract with A. for the cleaning of the boilers of one of their ships which was lying in Glasgow Harbour. B., one of several boiler scalers employed and paid by A. to do the work, was accidentally injured while so employed. Shipowners on the river Clyde occasionally have the work of boiler scaling performed by their own men without calling in a contractor.

HELD—that the work at which B. was engaged at the time of the accident was not work “undertaken” by the shipowners “in the course of or for the purposes of their trade or business,” and that accordingly they were not liable to pay compensation.

2322.—*Luckwill v. Auchen Steamship Co.*, [1913] W. C. & I. Rep. 167; 108 L. T. 52; 6 B. W. C. C. 51—C. A.

Where the owners of a steamship entered into a contract with a contractor to scale the boilers of the vessel, and he engaged certain workmen to do the work, the principals not exercising any control over the workmen, it not being their practice to undertake the scaling of the boilers of their steamships themselves, they always employing an independent contractor to do it, the operation that the contractor had contracted to perform for the principals was held not to be work executed “in the course of or for the purposes of” the principal’s “trade or business” within the meaning of s. 4, sub-s. 1, of the Workmen’s Compensation Act, 1906, so that the principals were not liable to pay compensation to one of the workmen who was injured by “accident arising out of and in the course of” his employment.

Notes.—*Spiers v. Elderslie Steamship Co.* [2321], the reasoning of which was adopted by the Court of Appeal in England in *Skates v. Jones* [2314] applied.

2323.—*Stewart v. Dublin and Glasgow Steam Packet Co.* (1902), 5 F. 57; 40 Sc. L. R. 41—Ct. of Sess.

HELD—that the supplying of coal to the vessels of a steamship company, was not part of, but ancillary to, the business of the company.

2324.—*Stalker v. Wallace* (1900), 2 F. 1162; 37 Sc. L. R. 898—Ct. of Sess.

A building contractor was erecting a tenement for himself, doing the work partly by his own workmen and partly by trading firms with whom he had contracts for particular branches of the work.

HELD—that he was the “undertaker” of the whole building within the meaning of the Workmen’s Compensation Act, 1897, and was therefore liable in compensation in respect of injuries to a workman employed in the construction of the building by one of the trading firms (Clerk, L.J., *dubitante*).

Notes.—The principle on which this case was decided is good law, in the opinion of Cozens-Hardy, M.R., in *Skates v. Jones* [2314].

2325.—*Brine v. May, Ellis, Grace & Co.* (No. 2) (1913), 6 B. W. C. C. 134; [1913] W. C. & I. Rep. 648—C. A.

A surveyor contracted to have his house repaired, and arranged that he should supervise the work himself.

HELD—this was not a contract “in the course of or for the purpose of” the surveyor’s trade or business.

2326.—*Waites v. The Franco-British Exhibition (Incorporated)* (1909), 25 T. L. R. 441; 2 B. W. C. C. 199—C. A.

One Lovelace agreed with the appellant corporation to keep an airship on exhibition in the corporation’s grounds, and to pay the wages of a turnstile man who was to be the servant of the corporation. Admission to view the airship was only to be obtained by tickets through registering turnstiles or by tickets to be provided by the corporation. The corporation were to pay Lovelace 50 per cent. of the gross receipts, and out of that Lovelace was to pay persons engaged by him. Waites, who was a lecturer employed by Lovelace, was killed by an explosion of the airship. His widow claimed compensation against the exhibition.

HELD—(1) that the lecturer was not a “workman” within the meaning of s. 13 of the Workmen’s Compensation Act, 1906, and

(2) That, assuming the lecturer was a workman, his widow’s remedy was against Lovelace and not against the corporation, as the latter had not undertaken the exhibition of the airship as part of their trade or business or employed Lovelace to execute work they had undertaken to do.

(b) *Cases decided under the Act of 1897 on the Question whether the Work was "Merely Ancillary or Incidental to" or was "Part of" the Work of the Person employing the Contractor.*

2327.—Burns v. North British Railway (1900), 2 F. 629; 37 Sc. L. R. 448—Ct. of Sess.

A railway company employed a firm of signal-makers to fit up the necessary signals for new sidings, which they were constructing in connection with their existing line. While fitting the signal wires, a workman employed by the signal-makers was knocked down by a train on the main line and killed.

HELD—that the work on which the deceased was engaged at the time of the accident was part of the business of the railway company, and was not merely ancillary or incidental thereto, and that the company were, in terms of s. 4 of the Act, liable as undertakers to pay compensation.

Notes.—*Devine v. Caledonian Railway*, 1 F. 1105 [2010], referred to.

2328.—Greenhill v. Caledonian Railway (1900), 2 F. 736; 37 Sc. L. R. 524—Ct. of Sess.

A railway company charged a through rate, inclusive of all charges for collection and delivery, for the conveyance of goods by their railway. A firm of carting contractors contracted with the railway company for the collection and delivery from and to the public of goods sent or to be sent by rail, receiving from the railway company in payment of such collection and delivery a proportion of the through rates paid by the public. A servant of the contractors, acting in pursuance of the contract between his employers and the railway company, was fatally injured while he was engaged in transferring goods from a lorry to a goods train for transmission by rail.

HELD—that the work in which he was engaged at the time of the accident was part of the work undertaken by the railway company and not merely ancillary or incidental thereto, and that the company were liable to pay compensation.

2329.—Bee v. Ovens (1900), 2 F. 438; 37 Sc. L. R. 328—Ct. of Sess.

A firm of contractors were under a contract to do all the carting work in connection with a factory. One of the carters in the employment of the carting contractors was injured within the factory when engaged in carting work under this contract. He claimed compensation against the occupiers of the factory as the undertakers in the sense of the Act.

HELD—that the carting work in which he was engaged at the time of the accident was not, within the meaning of s. 4 of the Act "merely ancillary or incidental to," but "was part of the trade or business carried on" by the defenders in the factory, and that they were liable to him in compensation under s. 4.

Per Lord Moncreiff: Under s. 4 an undertaker may be liable to the servant of a contractor, although his own employer—the contractor—is not liable to him either under the Act or otherwise.

2330.—M'Govern v. Cooper (1901), 4 F. 249; 39 Sc. L. R. 102; [1903] W. N. 160—Ct. of Sess.

A carter who was loading a cart outside the gate of a factory, on the other side of the road, 32 feet away from the factory gate, was injured.

HELD—that the carting was part of the business carried on by the defenders in the factory.

2331.—Bartell v. Gray, [1902] 1 K. B. 225; 4 W. C. C. 95—C. A.

The repairing of ships is merely “ancillary to” the business of shipowners.

Notes.—*Per Matthew, L.J.*: “A ship is a freight-earning machine, and for the purposes of enabling her to earn freight, it is indispensable that the owner should enter into contracts at different times for the purpose of keeping her in proper condition. Those contracts are ancillary to the purpose of the ship earning freight, and the shipowner would not be liable to the workman in a case like the present.

2332.—Pearce v. London and South Western Railway, [1900] 2 Q. B. 100; 69 L. J. Q. B. 683; 82 L. T. 487; 48 W. R. 599; 16 T. L. R. 386—C. A.

The work of building, repairing, and painting the stations of a railway company is “merely ancillary or incidental to and is no part of or process in the trade or business carried on by” the company. Therefore where the railway company enter into a contract with a contractor for the execution of such work, and a workman in the employment of the contractor sustains injury in the course of executing the work, s. 4 of the Workmen's Compensation Act, 1897, does not apply, and the company are not, as undertakers, within the Act, liable to pay compensation to the workman.

2333.—Wrigley v. Bagley and Wright (or Whittaker), [1901] 1 Q. B. 780; 3 B. W. C. C. 61—C. A. Affirmed [1902] A. C. 299—H. L.

A firm of engineers contracted with the owners of a cotton spinning factory to put a new driving wheel into the steam-engine belonging to the factory. While engaged in fixing the new wheel a workman employed by the engineers was killed.

HELD—that the work being merely ancillary or incidental to, and no part of, or process in the business of the owners of the cotton spinning factory, the case did not come within s. 4 of the Workmen's Compensation Act, 1897.

Notes.—During the argument it was contended that pulleys which were worked by the machinery of a winch, the winch itself being worked by hand power, were “machinery worked by

mechanical power." The point was overruled and abandoned during the course of the argument. *Pearce v. London and South Western Railway* [2332] referred to.

2334.—*Brennan v. Dublin United Tramways Co.*, [1901] 2 Ir. R. 241; 34 Ir. L. T. 113—C. A. (Ir.).

An electric tramway company employed a firm of contractors to erect coal-hauling machinery at one of their power stations. Part of the coal-hauling machinery consisted of a trolley at which B. was engaged at work. A splinter from the head of a bolt which he was driving into the trolley struck him in the eye and destroyed its sight. B. was employed by the firm, and not by the company. At the time of the accident the firm had not handed over the coal-hauling machinery to the company, and none of the company's workmen were engaged upon it.

HELD—that the erection of the coal-hauling machinery was work merely ancillary to the company's trade or business, and that they were not liable to pay compensation to B.

Notes.—*Pearce v. London and South Western Railway* [2332] approved.

2335.—*Dundee and Arbroath Joint Railway v. Carlin* (1901), 3 F. 843; 38 Sc. L. R. 632—Ct. of Sess.

A workman, when engaged in the employment of a builder in the erection of a stone and lime wall in a railway cutting, was run down and killed by a passing train. The wall, which the builder had contracted to build for the railway company, was intended to prevent earth on the bank of the cutting from falling down and obstructing the access to a signal-cabin belonging to the railway company. The workman's widow claimed compensation under the Workmen's Compensation Act, 1897, from the railway company, as the undertakers within the meaning of the Act.

HELD (Lord Young *diss.*)—that the work on which the deceased was engaged was not part of the business of the railway company, but was merely ancillary or incidental thereto, and that the railway company was not liable.

Notes.—*Burns v. North British Railway* [2327] not followed; *Pearce v. London and South Western Railway* [2332] approved; *Fullick v. Evans*, 17 T. L. R. 346, referred to.

2336.—*Bush v. Hawes*, [1902] 1 K. B. 216; 71 L. J. K. B. 68; 85 L. T. 507; 50 W. R. 311; 66 J. P. 260—C. A.

In an arbitration under the Workmen's Compensation Act, 1897, in which compensation was claimed from a builder, who had contracted to construct a factory, in respect of injury done to a workman in the employ of a sub-contractor for the fixing of an iron roof in the course of that work, the county court judge found that the fixing of the iron roof was no part of the business of the builder, but that, taking into consideration the character of the business of a builder

as carried on generally, the fixing of an iron roof was a part of that business, and consequently the last clause of s. 4 of the Act did not exempt the builder from liability to pay compensation.

HELD—that, having regard to the finding of fact that the fixing of the roof was no part of the business of the builder, the last clause of s. 4 applied, and the builder was not liable to pay compensation.

Notes.—The principle upon which this case was decided is contrary to the decision in *Skates v. Jones*, [1910] 2 K. B. 903 [2314].

2337.—*Knight v. Cubitt*, [1902] 1 K. B. 31; 71 L. J. K. B. 65; 85 L. T. 526; 50 W. R. 113—C. A.

Builders having contracted to demolish a building, leaving the party-wall between it and the adjoining building standing, and to rebuild upon the site, entered into a contract with a housebreaker for the work of demolition. At a time when the building had been reduced to less than 30 feet, except that the party-wall remained intact and exceeded that height, injury resulting in death was caused to a workman employed by the housebreaker. It was the usual practice of the builders to enter into contracts for pulling down and rebuilding, but they invariably sub-let the work of pulling down.

HELD—(1) that the builders were “undertakers” in respect of the work of demolition within the meaning of s. 7 of the Workmen’s Compensation Act, 1897; (2) that the work of demolition was not merely ancillary to, but was a part of the business carried on by the undertakers, and therefore the last clause of s. 4 of the Act did not operate to exempt them from liability to pay compensation; and (3) that there was evidence on which the county court judge was justified in finding that the employment of the workman was upon a building exceeding 30 feet in height being demolished.

Notes.—*Billings v. Holloway*, [1899] 1 Q. B. 70, referred to.

2338.—*Dempster v. Hunter* (1902), 4 F. 580; 39 Sc. L. R. 395—Ct. of Sess.

A window-cleaner, while engaged, in the employment of a window-cleaning company, in cleaning the windows of a workshop belonging to a firm of tailors, fell from one of the windows and was injured. He claimed compensation from the tailors as being the undertakers within the meaning of the Workmen’s Compensation Act, 1897.

HELD—that the work of window-cleaning was not a part of or process in the trade or business carried on by the respondents, and consequently, under s. 4 of the Act, that they were not liable to pay compensation.

Notes.—*Dundee and Arbroath Joint Railway v. Carlin*, 3 F., at p. 848 [2335], cited. See also *M’Govern v. Cooper* [2330].

The following decisions under the Act of 1897 may also be referred to on this point: *Hardy v. Moss and Fidler* (1903), 6 B. W. C. C. 68; *Jackson v. Rodger* (1899), 1 F. 1053.

III. *Principal only Liable as if Workman had been immediately Employed by Him.*

2339.—Marks v. Carne, [1909] 2 K. B. 516; 78 L. J. K. B. 853; 100 L. T. 950; 53 S. J. 561; 25 T. L. R. 620—C. A.

The respondent, a timber merchant, having purchased certain trees in the course of his business, contracted with M. to fell the same. M. employed the applicant, his son, to help him in carrying out his contract with the respondent, and the applicant suffered personal injury in so doing. In proceedings by the son to recover compensation from the respondent as principal under s. 4 of the Workmen's Compensation Act, 1906, it being admitted that the son had no claim against his father by reason of his being a "member of his employer's family dwelling in his house" within the definition of "workman" in s. 13 of the Act:

HELD—that, inasmuch as the liability under s. 4 is a liability on the part of the principal to pay compensation to the "workman employed," and as the son was not a "workman" within the meaning of the Act as between himself and his employer, his father, the respondent was not liable as a principal under s. 4.

Notes.—Cozens-Hardy, M.R., in his judgment said: "I think the section gives no right to a man who was not a 'workman' within the definition clause. The section contemplates two persons, namely, the actual employer of the workman, called the contractor, and a hypothetical employer of the workman called the principal. The principal is entitled to be indemnified by the contractor, and his liability is measured by the liability of the contractor. . . . I am not prepared to hold that the principal is liable to pay compensation to a man who has no claim against the contractor, his true employer. The words 'as if that workman had been immediately employed by the principal,' are not strong enough to outweigh the language of the section as a whole."

IV. *"On, or in, or about Premises."*

2340.—Andrews v. Andrews and Mears, [1908] 2 K. B. 567; 77 L. J. K. B. 974; 99 L. T. 214; 24 T. L. R. 709—C. A.

In connection with a paving contract involving the removal of rubbish, but not requiring it to be shot at any particular place, a workman, who was employed by a sub-contractor, whilst engaged in carting away a load of rubbish, met with a fatal accident in a public street at a distance of about two miles from the place where the paving work was being done.

HELD—that the accident had not occurred "on, or in, or about premises" on which "the principal" contractor had undertaken to execute the work or which were "otherwise under his control or management," and that, therefore, he was within sub-s. 4 of s. 4 of the Workmen's Compensation Act, 1906, and was not liable to pay compensation as "the principal" under sub-s. 1 of that section.

Notes.—Cozens-Hardy, M.R., during the argument as to the meaning of the words “on, or in, or about premises” remarked that “the words must be construed as they were under the old Act.”

2341.—*Powell v. Brown*, [1899] 1 Q. B. 157; 68 L. J. Q. B. 151; 79 L. T. 631; 47 W. R. 145; 15 T. L. R. 64—C. A.

A carter, in the employment of the defendants, who were the occupiers of a timber factory, was engaged in loading timber on to one of the defendants' carts which was standing in the street close to the entrance to the factory. Whilst standing in the cart waiting to complete the loading, a piece of timber tilted up and the carter was thrown on to the road and subsequently died from injuries received. The county court judge held that loading the timber on carts was part of the business of the factory, and that the accident happened to the carter whilst employed “about” the factory within the meaning of s. 7, sub-s. 1, of the Workmen's Compensation Act, 1897. On appeal:

HELD—that the section includes the case of employment in proximity to a factory, and that consequently it was a question of fact for the arbitrator to determine whether, as a matter of fact, the employment was in proximity to the employers' factory.

Notes.—In his judgment, A. L. Smith, L.J., said: “The question arises, what meaning is to be attached to the words ‘on, in, or about’ used in this section? It is obvious that the legislature thought that the first two words were not large enough to cover all that they intended to include, and they therefore added the word ‘about,’ which is clearly an enlarging word. In my view, that word means that the employment may be in close propinquity to the factory, and whether that was so in any particular case is a question of fact to be determined by the tribunal before which the claim comes.” Collins, L.J., said: “Without limiting the use of the word ‘about’ to physical proximity, I think it certainly includes that. The word is put there to cover something which would not be covered by the words ‘on or in’ ”

2342.—*Lowth v. Ibbotson*, [1899] 1 Q. B. 1003; 68 L. J. Q. B. 465; 80 L. T. 341; 47 W. R. 506; 15 T. L. R. 264—C. A.

A carter employed by the occupiers of a factory sustained personal injury by accident arising out of and in the course of his employment while delivering goods taken from his employers' factory upon their dray at a distance of one mile and a half from the factory. At the hearing of a claim for compensation under the Workmen's Compensation Act, 1897, a county court judge held that the workman was not at the time of the accident employed “about” a factory within the meaning of s. 7, sub-s. 1, of the Act.

HELD—that, as upon the true construction of the word “about” in the sub-section, the question of fact for the county court judge was whether the employment was in close propinquity to the factory, and not whether it related to the business of the factory, the decision of the county court judge must be upheld.

Notes.—*Powell v. Brown* [2341] followed.

N.B.—The following cases are no longer of authority, in so far as they are based on the meaning of s. 7, sub-s. 1, of the Act of 1897, yet by analogy they may be used to determine the meaning of the words “on, or in, or about,” contained in s. 4, sub-s. 4, of the Act of 1906. See [2340].

2343.—Whitton v. Bell and Sime, Ltd. (1899), 1 F. 942 ; 36 Sc. L. R. 754—Ct. of Sess.

2344.—Kent v. Porter (1901), 38 Sc. L. R. 482—Ct. of Sess.

A carter whilst driving his cart met with an accident at a point, in *Whitton's* case, about two miles, and in *Kent's* case at a point half a mile distant from the factory where he was employed.

HELD—that the employment was not “about” a factory, and that accordingly the employers were not liable to pay compensation.

2345.—Fenn v. Miller, [1900] 1 Q. B. 788 ; 69 L. J. Q. B. 439 ; 82 L. T. 284 ; 48 W. R. 369 ; 64 J. P. 356 ; 16 T. L. R. 265—C. A.

A workman was conveying water in a water cart for the supply of a steam engine which was a factory within the meaning of the Workmen's Compensation Act, 1897, when at a distance of at least 110 yards from the engine injury was caused to him in consequence of the horse drawing the cart running away.

HELD—that, on these facts it could not be rightly found that the workman was at the time of the accident employed “about” a factory within the meaning of s. 7, sub-s. 1, of the Act.

2346.—Chambers v. Whitehaven Harbour Commissioners, [1899] 2 Q. B. 132 ; 68 L. J. Q. B. 740 ; 80 L. T. 586 ; 47 W. R. 533 ; 15 T. L. R. 341—C. A.

The words “on, or in, or about” in s. 7, sub-s. 1, of the Workmen's Compensation Act, 1897, which provides that the Act shall apply only to employment on or in or about a railway, factory, mine, quarry or engineering work, are used to indicate locality.

A workman was employed upon a steam dredger used for dredging a harbour, it being part of his duty to go to sea with the hoppers, into which the mud from the harbour was dredged by the steam dredger, and empty them outside the harbour at sea. The workman was killed by an accident in the course of emptying one of the hoppers outside the harbour at sea.

HELD—assuming that the steam dredger was an “engineering work” within the meaning of the Act, that the workman was not at the time of the accident employed “on, or in, or about” it within the meaning of s. 7, sub-s. 1, and therefore the Act did not apply.

2347.—Pattison v. White & Co. (1904), 20 T. L. R. 775—C. A.

A workman who was employed as a carman to cart sand from a sandpit to a place where a railway was being constructed met with

an accident while driving a cart with sand in it, at a place two and a half miles distant from the place where the work of construction was being carried on.

HELD—that the accident did not happen “about” the engineering work within the meaning of s. 7 of the Workmen's Compensation Act, 1897, the word “about” signifying a physical locality.

Notes.—*Chambers v. Whitehaven Harbour Commissioners* [2346]; *Atkinson v. Lumb* [2368]; *Wrigley v. Whittaker*, [1902] A. C. 299 [2333], referred to.

2348.—*Bathgate v. Caledonian Railway* (1901), 4 F. 313; 39 Sc. L. R. 246—Ct. of Sess.

A carter, in the employment of contractors who had a contract with a railway company for the cartage of goods to and from a station of the company, had delivered certain goods at the station. This finished his day's work, and as he was leaving the station with his horse and lorry, on the way to the contractor's stables, the horse took fright and bolted just outside the gate of the station, and in consequence the carter was injured by the horse and lorry dashing into a shop 315 yards distant.

HELD (Lord Moncreiff *diss.*)—that the carter did not sustain his injuries “on, or in, or about” a railway, within the meaning of s. 7, sub-s. 1, of the Act.

2349.—*Turnbull v. Lambton Collieries Co.* (1900), 82 L. T. 589; 64 64 J. P. 404; 16 T. L. R. 369—C. A.

The Workmen's Compensation Act, 1897, s. 7, sub-s. 2, provides that “in this Act, ‘mine’ means a mine to which the Coal Mines Regulation Act, 1887, applies”; and the latter Act, s. 75, provides that, “in this Act, unless the context otherwise requires, ‘mine’ includes . . . all the shafts, levels, planes, works, tramways, and sidings, both below ground and above ground, in and adjacent to and belonging to the mine.” The defendants owned a number of collieries, and also a private railway about twelve miles long, not being a “railway” within the meaning of the Workmen's Compensation Act, 1897. This railway connected all the collieries, and was used for conveying coal from all the collieries, and was the sole means by which coal was conveyed away from them; and there was on this railway a depot, with sidings, where coal was stored and distributed to purchasers. An engine-driver employed by the defendants was killed by accident when he was driving the engine of a train carrying coal from one of the collieries to the depot; the accident occurred about three-quarters of a mile from the pit mouth of this colliery and close to the sidings of the depot.

HELD—that the workman was not employed “on, or in, or about a mine,” within the meaning of the Act, when the accident happened.

Notes.—*Powell v. Brown* [2341]; *Lowth v. Ibbotson* [2342]; *Chambers v. Whitehaven Harbour Commissioners* [2346]; *Fenn v. Miller* [2345], followed on the ground that the employment must be in close proximity to the “railway, factory, mine, quarry.”

2350.—Ferguson v. Barclay (1902), 5 F. 105; 40 Sc. L. R. 58—Ct. of Sess.

The applicant, who was injured while in the service of the defenders—a firm of engineers, whose works were a factory within the meaning of the Act—as one of a squad of men “working at a locomotive engine,” the property of the defenders in a shed belonging to and used by a railway company, of which shed the defenders were tenants under an agreement with the railway company. The shed was about half a mile from the defenders’ works, and had no direct connection therewith by rail; it had previously been used on many occasions by the defenders for similar purposes. No steam, water, or other mechanical power was used in the shed.

HELD—that the applicant was not employed “on, or in, or about” the defenders’ factory, and was not entitled to compensation.

2351.—Barclay, Curle & Co. v. M’Kinnon (1901), 3 F. 436; 38 Sc. L. R. 321—Ct. of Sess.

A riveter was injured in the employment of a firm of ship-repairers, while repairing a ship in a public dock at a distance from his employers’ factory of 550 yards in a direct line, and about a mile by road. The employers’ factory was not a shipbuilding yard.

HELD—that the riveter was not, when he received the injuries, employed “about” a factory in the sense of the Workmen’s Compensation Act.

Notes.—*Malcolm v. M’Millan*, 2 F. 525; *Fenn v. Miller* [2345]; *Francis v. Turner* [2366]; *Brodie v. North British Railway* [2364] referred to.

2352.—Monaghan v. United Collieries (1900), 3 F. 149; 38 Sc. L. R. 92—Ct. of Sess.

A colliery company, owners of a coal mine and siding connecting the mine with a main line of railway, entered into a contract with the owner of a sand-pit situated on the main line to carry sand from the sand-pit in railway waggons to the colliery siding, preparatory to removal by the railway company. The haulage was to be done by an engine belonging to the colliery company, and used in connection with their mine and siding. The siding was about eighty yards in length, and served only the one mine. The sand-pit was 300 or 400 yards from the siding. In the course of executing this contract the brakesman of the engine, who was in the employment of the colliery company, was killed while uncoupling waggons on the main line at or near the extremity of the siding.

HELD—(1) that the employment of the deceased was locally “about” a mine in the sense of s. 7, sub-s. 1, of the Workmen’s Compensation Act, 1897.

(2) (Lord Adams *diss.*) That a claim for compensation arose, although the work upon which the deceased was employed at the time of the accident was not part of the proper business of the colliery.

Notes.—*Powell v. Brown* [2341] followed; *Francis v. Turner* [2366] and *Whitton v. Bell and Sime* [2343] distinguished.

2353.—Coylton Coal Co. v. Davidson (1905), 7 F. 727—Ct. of Sess.

A workman employed as a carter at a coal mine sustained fatal injuries while transferring timber to a colliery cart from a railway waggon at a railway siding belonging to and in the occupation of a railway company. The place where the accident occurred was about 400 yards from the pit, the distance being made up of—firstly, railway siding (123 yards); secondly, the breadth of a public road; and thirdly, a private cart road leading to the pit (259 yards).

HELD—that the workman was not injured in the course of employment “on, or in, or about a mine” within the meaning of the Act.

Notes.—*Fenn v. Miller* [2345]; *Brodie v. North British Railway* [2364]; *Caton v. Summerlee and Moss End Iron and Coal Co.*, 4 F. 989 [2115]; *Ferguson v. Barclay* [2350]; *Lysons v. Andrew Knowles*, [1901] A. C. 85 [2579], cited.

2354.—M'Adam v. Harvey, [1903] 2 Ir. R. 511; 36 Ir. L. T. 89—C. A. (Ir.).

A workman was employed, along with other men in the same employment, in putting down a flooring of cement in a house which exceeded thirty feet in height, and was constructed by means of scaffolding. The workman left the house to fetch a pickaxe from his employer's yard. On his way he slipped and fell, receiving injuries in respect of which he claimed compensation. No evidence was given as to the exact spot where the accident happened, or as to how far it was from the building where the applicant was working.

HELD—that it lay on the applicant to show that the accident arose out of and in the course of his employment “on, or in, or about” the building, and that not having discharged this *onus* by giving evidence of the exact locality where the accident happened, he was not entitled to compensation.

Notes.—*Powell v. Brown* [2341]; *Fenn v. Miller* [2345]; *Cosgrave v. Anglo-American Oil Co.*, 34 Ir. L. T. R. 56, referred to.

2355.—Back v. Dick, Kerr & Co., Ltd., [1906] A. C. 325; 75 L. J. K. B. 569; 94 L. T. 802; 22 T. L. R. 548—H. L. (E.).

A workman was injured in unloading rails for contractors, who were converting a horse tramway into an electric tramway, at a distance of 700 yards from the site of actual operations and fifty yards from part of the tramway so to be converted. He was at work in a railway yard in which by arrangement with the railway company the rails were stacked.

HELD (Lord Loreburn, L.C., and Lord James of Hereford *diss.*)—that he was not employed “on, or in, or about an engineering work” within the meaning of the Workmen's Compensation Act, 1897, s. 7.

Notes.—*Wrigley v. Whittaker* [2333] discussed.

2356.—Spacey v. Dowlais Gas and Coke Co., [1905] 2 K. B. 879; 75 L. J. K. B. 5; 54 W. R. 138; 22 T. L. R. 29—C. A.

A workman, in the employment of a gas company, engaged in work in connection with a gas main at a distance from the gas works where the gas is manufactured is not employed “on, or in, or about a factory” within the meaning of s. 7 of the Workmen’s Compensation Act, 1897, for the gas mains, being used merely for the distribution of the gas, are no part of the “factory”—that is, of the place where the gas is manufactured.

Notes.—*Fenn v. Miller* [2345] referred to.

2357.—Rimmer v. Premier Gas Engine Co. (1907), 97 L. T. 226; 23 T. L. R. 610—C. A.

In the course of the construction of a shipbuilding yard, which was to consist of three dry docks and one wet dock, it became necessary to erect on some part of the yard a station for generating electricity, the use of electricity both for light and power having been decided upon. For this and other purposes ten gas engines were required. A workman in the employment of a gas engine company, which had contracted to supply the gas engines, was injured while working at the gas engine machinery. The place where the accident occurred was at a distance of about 150 yards from the nearest part of any of the docks.

HELD (Kennedy, L.J., *diss.*)—that, the accident not having occurred in a “dock” in any proper sense of that word, but at a considerable distance from the nearest part of any of the docks, the workman could not be said to be employed “on, or in, or about” an “engineering work”—namely, the “construction of a dock”—within the meaning of s. 7 of the Workmen’s Compensation Act, 1897.

Notes.—*Back v. Dick, Kerr & Co., Ltd.* [2355] considered. *Fullick v. Evans, O’Donnell & Co., Ltd.*, 84 L. T. R. 413, referred to.

2358.—Anderson v. Lochgelly Iron and Coal Co. (1904), 7 F. 187; 42 Sc. L. R. 147—Ct. of Sess.

A mine was connected with a main line of railway by a private line, about a mile and a-quarter in length. At a point in this private line about 800 yards from the mine there was a drum house and sidings connected therewith. At this point an engine-driver in the employment of the mine-owners was killed in the course of his employment.

HELD (the Lord Justice Clerk *diss.*)—that the place where the accident occurred was “on, or in, or about a mine” within the meaning of the Workmen’s Compensation Act.

Notes.—*Monaghan v. United Collieries* [2352]; *Turnbull v. Lambton Collieries Co.* [2349]; *Caton v. Summerlee and Mossend Coal Co.* [2115], discussed.

2359.—Rogers v. Cardiff Corporation, [1905] 2 K. B. 832; 75 L. J. K. B. 22; 93 L. T. 683; 54 W. R. 35; 70 J. P. 9; 4 L. G. R. 1; 22 T. L. R. 9—C. A.

The C. Corporation owned the electric tramways in C. and were under the obligation of keeping the tramline and overhead wires in proper repair. The applicant was employed by the corporation, and his duty was to attend to the repairs of the overhead wires. On the day of the accident he had repaired the wires at one place, and was proceeding along the tram-route to another place some distance off to do repairs there, when he was injured, and in respect of his injuries he claimed compensation. The county court judge, in view of the obligation of the corporation to keep the whole of their tramway system in repair, found that the area of the "engineering work" on which the applicant was employed was co-extensive with the whole area of the tramway, and awarded compensation.

HELD—that there was evidence justifying the county court judge in so finding.

Notes.—*Back v. Dick, Kerr & Co., Ltd.*, [2355]; *Chambers v. Whitehaven Harbour Commissioners* [2346]; *Pattison v. White* [2347], distinguished.

2360.—Owens v. Campbell, [1904] 2 K. B. 60; 73 L. J. K. B. 634; 90 L. T. 811; 52 W. R. 481; 68 J. P. 410; 20 T. L. R. 459—C. A.

A seaman employed as fireman upon a passenger steamship, whilst attending to the boilers in the ordinary course of his duties, was injured by the bursting of a tube in one of the boilers. At the time of the accident the vessel was made fast by ropes to a landing-stage outside the entrance to docks, and gangways were out from the landing-stage to the vessel to enable the passengers to go on board.

HELD (Collins, M.R., and Romer, L.J.; Mathew, L.J., *diss.*)—that though the landing-stage, being a wharf, might be a "factory," and the seaman's employers, the shipowners, being at the time in occupation of the landing stage, might be "undertakers" within the meaning of s. 7 of the Workmen's Compensation Act, 1897, yet the case did not come within the Act, for the seaman was not at the time of the accident in fact employed "on" or "in" such factory nor was he employed "about" it within the meaning of the section, for his employment, though in proximity to the "factory," had no concern or connection with the purposes for which it was at the time being occupied by his employers.

Notes.—*Griffin v. Houlder Line, Ltd.*, [1904] 1 K. B. 510; *Raine v. Jobson*, [1901] A. C. 404, distinguished.

2361.—Flowers v. Chambers, [1899] 2 Q. B. 142; 68 L. J. Q. B. 648; 80 L. T. 834; 47 W. R. 513; 15 T. L. R. 352—C. A.

A workman employed upon a vessel in a dock is not employed "on, or in, or about" the dock so as to be employed "on, or in, or

about a factory ” within the meaning of s. 7, sub-s. 1, of the Workmen’s Compensation Act, 1897, in cases where the dock is a “factory ” within the meaning of s. 7, sub-s. 2, of the Act.

Notes.—*Woodham v. Atlantic Transport Co.*, [1899] 1 Q. B. 15, referred to.

2362.—*Cayzer, Irvine & Co. v. Dickson* (1905), 7 F. 723—Ct. of Sess.

Shipowners took a ship into a dry dock which they had hired for the purpose of repairing the ship. A workman, who had served as ship’s carpenter on board the ship during one voyage and was engaged for her next voyage, in the interval between the voyages was employed by the shipowners in the work of repairing the ship. While engaged in unshackling the ship’s cable, in order to turn it end for end, he sustained injuries from which he died.

HELD—that the workman was employed in the repair of a ship “in or about a factory ” within the meaning of the Act, and that the shipowners were liable to pay compensation.

See also *Cattermole v. Atlantic Transport Co.* [2237].

2363.—*Milner v. Great Northern Railway*, [1900] 1 Q. B. 795 ; 69 L. J. Q. B. 427 ; 82 L. T. 187 ; 48 W. R. 387 ; 64 J. P. 291 ; 16 T. L. R. 249—C. A.

A refreshment room at a railway station is not a part of the station “used for the purposes of public traffic ” so as to come within the meaning of the term “railway ” in the Regulation of Railways Act, 1873.

The employment by a railway company of a barmaid at a refreshment room at their railway station is not an employment “on, or in, or about a railway ” within the meaning of the Workmen’s Compensation Act, 1897.

Notes.—*South Eastern Railway Co. v. Railway Commissioners*, 6 Q. B. D. 586, applied.

2364.—*Brodie v. North British Railway* (1900), 3 F. 75—Ct. of Sess.

A trading company’s premises were connected by a siding, which was its own property, with a line of railway belonging to a railway company. The siding, which was not constructed or carried on under any Act of Parliament, was used solely for the traffic of the trading company, and for that purpose was used by the railway company by means of its own rolling stock and servants. A servant of the railway company while so employed was accidentally injured at a point on the siding three-quarters of a mile from its junction with the line of railway.

HELD—that the accident had not occurred “on, or in, or about ” a railway within the meaning of the Workmen’s Compensation Act.

2365.—*Ellison v. Longden & Son* (1901), 18 T. L. R. 48—C. A.

Employment in blasting boulders of stone upon a common for the purpose of making a road which was a necessary part of preparing

and working a mine, the place of employment being within six or seven yards from the mouth of a tunnel into the side of a hill used for sinking a shaft for the purpose of opening and commencing the mine, held to be evidence of employment "on, or in, or about" a mine within s. 7 of the Workmen's Compensation Act, 1897.

2366.—*Francis v. Turner*, [1900] 1 Q. B. 478; 69 L. J. Q. B. 182; 81 L. T. 770; 48 W. R. 228; 64 J. P. 53; 16 T. L. R. 105—C. A.

Employment by the undertakers "on, or in, or about" a factory in s. 7 of the Workmen's Compensation Act, 1897, means employment by them "on, or in, or about" their factory, and not that of a third person.

2367.—*Mooney v. Edinburgh and District Tramway Co.* (1901), 4 F. 390; 39 Sc. L. R. 260—Ct. of Sess.

A cable tramway company had a covered shed for their cars 550 feet long and 160 feet wide, and adjoining it a machine room or workshop seventy-five feet long and fifty feet wide, which contained lathes, turning machines, and boring machines, driven by two electric motors. This workshop was used solely for the repairs of the grippers and other parts of the cars. The cars were always brought to the shed for repairs, and were repaired in it. No mechanical power was used in the shed except the power employed to move a travelling platform for moving the cars, which was derived from a steam engine adjoining the shed. A car driver was injured when employed in oiling his car in the shed at a point 374 feet distant from the machine room.

HELD (Lord Moncreiff *diss.*)—that the machine room was a factory in the sense of the Act, and that the accident occurred "on, or in, or about" a factory within the meaning of s. 93, sub-s. 3 (*b*), of the Factory and Workshop Act, 1878.

Notes.—*Caledonian Railway v. Paterson*, 1 F. 24, referred to.

2368.—*Atkinson v. Lumb*, [1903] 1 K. B. 861; 72 L. J. K. B. 460; 88 L. T. 789; 51 W. R. 516; 67 J. P. 414; 19 T. L. R. 412—C. A.

The expression "engineering work" in s. 7 of the Workmen's Compensation Act, 1897, which provides that the Act shall apply only to employment "on, or in, or about," amongst other things, an "engineering work," refers not to the character of the labour which the workman is performing, but to the character of the physical thing or area upon which his labour is bestowed.

A reservoir was being constructed and a line of pipes therefrom laid down for the water supply of a town distant about two miles from the reservoir, the whole of the works being executed by a contractor under one contract. Machinery driven by steam power was being used for the construction of the reservoir. A workman in the employment of the contractor was injured while setting up a hand derrick for the purpose of laying the pipes at a point about

600 yards distant from the reservoir. The land where the pipes were to be laid between the place where the workman was at work and the reservoir had been staked out and a small part of the trench dug at the part furthest from the reservoir, but no pipes had been laid nor other work of laying the pipes done. In an arbitration under the Workmen's Compensation Act, 1897, the county court judge found as a fact that the construction of the reservoir and laying of the pipes therefrom was one entire work, and that, the construction of the reservoir being an "engineering work" within the meaning of the Act, the whole was an "engineering work."

HELD—that, having regard to the finding of the county court judge, the workman was employed "on" an "engineering work," and consequently that the Act applied.

Notes.—*Chambers v. Whitehaven Harbour Commissioners* [2346] and *Middlemiss v. Berwickshire County Council* [2369] considered.

2369.—*Middlemiss v. Berwickshire County Council*, (1900) 2 F. 392; 34 Sc. L. R. 297—Ct. of Sess.

Where a steam roller is used for the purpose of repairing a road, the operation is an engineering work within the meaning of s. 7, sub-s. 2, of the Workmen's Compensation Act, 1897.

A road was being repaired by means of a steam-roller and a water-cart. In the course of the work the steam roller was taken to a piece of road some little distance from where the water cart was, and there used in rolling the road, water not being required at that particular spot. The driver of the water-cart was directed to water a piece of the road some further distance off from where the roller was at work, and while he was yoking his horse it bolted, with the result that he was run over and killed.

HELD—that he was employed in an "engineering work" at the time of the accident.

Notes.—*Chambers v. Whitehaven Harbour Commissioners* [2346] distinguished.

2370.—*Nash v. Hollinshead*, [1901] 1 K. B. 700; 70 L. J. K. B. 571; 84 L. T. 483; 49 W. R. 424; 65 J. P. 357; 17 T. L. R. 352—C. A.

A workman who is employed in working a movable engine which can be connected by a driving-band and fly-wheel with a mill which is fixed in a farmer's farmyard, and which is used for grinding meal for feeding the stock on the farm, and not for the purposes of gain, is not employed "on, or in, or about a factory" within the meaning of that term in s. 7 of the Workmen's Compensation Act, 1897.

Notes.—*Ferrand v. Hallas Land and Building Co.*, [1893] 2 Q. B. 135, referred to.

2371.—*Strain v. Sloan* (1901), 3 F. 663—Ct. of Sess.

The applicant, employed by the respondents as a quay labourer at a wharf occupied by them, was assisting in removing girders from

the street immediately outside the wharf shed to the side of a steamship belonging to the respondents, which was being loaded. The girders were lifted by a hand crane on to a hand-truck, by which they were conveyed to the ship's side. While removing the hand-crane from one pile of girders to another pile, both of which lay in the street immediately outside the wharf shed, the applicant was jammed between the platform of the crane and one of the girders and sustained injuries.

HELD—(1) that as one or more of the provisions in s. 23 of the Factory and Workshop Act, 1895, applied to the wharf, it was a factory within the meaning of the Act of 1897.

(2) The fact that the accident happened on a public street, immediately outside the wharf shed, did not *per se* exclude a claim for compensation.

Notes.—*Hall v. Snowden, Hubbard & Co.* (No. 2), [1899] 2 Q. B. 136, disapproved.

V. “*Machinery Driven by Mechanical Power.*”

2372.—*Wilmott v. Paton*, [1902] 1 K. B. 237; 71 L. J. K. B. 1; 85 L. T. 569; 50 W. R. 148; 66 J. P. 197; 18 T. L. R. 48—C. A.

Machinery actuated by hand power is not worked by “steam, water, or other mechanical power,” within the meaning of s. 93 of the Factory and Workshop Act, 1878; and therefore the user of such machinery does not constitute the premises in which it is employed a “factory.”

Notes.—*Wrigley v. Bagley and Wright*, [1901] 1 K. B. 780 [2333], referred to. See also *Walsh v. Hayes* [2317].

VI. “*Alternative Liability.*”

2373.—*Meier v. Dublin Corporation*, [1912] 2 Ir. R. 129; 46 Ir. L. T. 236; 6 B. W. C. C. 441—C. A. (Ir.).

An applicant who seeks to avail himself of the provisions of s. 4 of the Workmen's Compensation Act, 1906, must elect whether he will proceed against the contractor or the principal, their statutory liability for compensation in cases of accident being alternative, and neither joint nor joint and several. Accordingly, where a workman obtained an award against the contractor who employed him, but, in consequence of the bankruptcy of the contractor and liquidation of the insuring company, was unable to realise more than a small portion of the amount awarded.

HELD—that he could not subsequently recover the balance of the award from the principal.

HELD FURTHER—that failure to serve notice of accident and claim on the principal within the prescribed time was also an answer to any claim against the principal.

Notes.—*Herd v. Summers* [2374] followed. *Mulrooney v. Todd*, [1899] 1 K. B. 165 [2315], distinguished, for in that case the Master of the Rolls said: “This case must not be referred to as

either holding or denying that both these parties were properly made parties. That point has not been raised and will not be covered by our decision."

2374.—Herd v. Summers (1905), 7 F. 870—Ct. of Sess.

A workman, while engaged in the employment of a glass merchant in repairing the glass on the roof of a factory occupied by a firm of wool manufacturers, fell from the roof and was killed. In an arbitration under the Workmen's Compensation Act, 1897, his widow and children claimed compensation from the glass merchant and the firm of wool manufacturers "jointly and severally, or severally, or in such proportions between them as to the court should seem just."

HELD—that as the Act imposed no joint liability, the application as directed against the two defenders jointly and severally was incompetent, and application dismissed.

VII. *Procedure.*

2375.—Appleby v. Horseley Co. (No. 2), [1899] 2 Q. B. 521; 68 L. J. Q. B. 894; 80 L. T. 855; 47 W. R. 614; 15 T. L. R. 510—C. A.

Where undertakers, as defined by the Workmen's Compensation Act, 1897, and a contractor with them, are both made respondents to arbitration proceedings under the Act, the undertakers, if they desire to make a claim in the proceedings to indemnity against the contractor, must, five clear days before the day fixed for proceeding with the arbitration, file a notice of their claim as provided by rule 19 of the Workmen's Compensation Rules, 1898.

Notes.—The effect of this decision was embodied in rule 26 (1) of the Workmen's Compensation Rules, 1897, now rule 27 (i.) of the Workmen's Compensation Rules, 1913.

BANKRUPTCY OF EMPLOYER.

Sect. 5.—(1) Where any employer has entered into a contract with any insurers in respect of any liability under this Act to any workman, then, in the event of the employer becoming bankrupt, or making a composition or arrangement with his creditors, or if the employer is a company in the event of the company having commenced to be wound up, the rights of the employer against the insurers as respects that liability shall, notwithstanding anything in the enactments relating to bankruptcy and the winding-up of companies, be transferred to and vest in the workman, and upon any such transfer the insurers shall have the same rights and remedies and be subject to the same liabilities as if they were the employer, so however that the insurers shall not be under any greater liability to the workman than they would have been under to the employer.

(2) If the liability of the insurers to the workman is less than the liability of the employer to the workman, the workman may prove for the balance in the bankruptcy or liquidation.

(3) There shall be included among the debts which under s. 1 of the Preferential Payments in Bankruptcy Act, 1888, and s. 4 of the Preferential Payments in Bankruptcy (Ireland) Act, 1889, are in the distribution of the property of a bankrupt and in the distribution of the assets of a company being wound up to be paid in priority to all other debts, the amount, not exceeding in any individual case one hundred pounds, due in respect of any compensation the liability wherefor accrued before the date of the receiving order or the date of the commencement of the winding-up, and those Acts and the Preferential Payments in Bankruptcy Amendment Act, 1897, shall have effect accordingly. Where the compensation is a weekly payment, the amount due in respect thereof shall, for the purposes of this provision, be taken to be the amount of the lump sum for which the weekly payment could, if redeemable, be redeemed if the employer made an application for that purpose under the First Schedule to this Act.

(4) In the case of the winding-up of a company within the meaning of the Stannaries Act, 1887, such an amount as aforesaid, if the compensation is payable to a miner or the dependants of a miner, shall have the like priority as is conferred on wages of miners by section nine of that Act, and that section shall have effect accordingly.

(5) The provisions of this section with respect to preferences and priorities shall not apply where the bankrupt or the company being wound up has entered into such a contract with insurers as aforesaid.

(6) This section shall not apply where a company is wound up voluntarily merely for the purposes of reconstruction or of amalgamation with another company.

Bankruptcy of Employer.

The object of this section is to protect the workman in case of the insolvency of his employer. It is necessary to distinguish between cases in which the employer has previously insured against his liability under the Act and cases in which he has not.

(1) *Where the bankrupt employer has insured*, sub-ss. 1 and 2 of s. 5 apply. The section in this case transfers to the workman all the rights of the employer against the insurers. The insurers have the same rights and remedies and are subject to the same liabilities as if they were the employer. Under s. 5 of the Act of 1897 there was a statutory subrogation of the workman to the right of the employer against the insurance company (*Kniveton v. Northern Employers' Mutual Indemnity Co.* [2378]; *Morris v. Northern Employers' Mutual Indemnity Co.* [2379]). But under the Act of 1906 the protection of the workman is extended because it prevents any claim on behalf of the general creditors, and is therefore "a subrogation protected against the claims of creditors." But the workman is in no better position than the employer was before the bankruptcy, and thus the workman will be unable to enforce his claim if the insurance company could have successfully resisted the claim for an indemnity under the policy (*King v. Phoenix Assurance Co.* [2376]; see also *Daff v. Midland Colliery Owners' Mutual Indemnity Co.* [2377]). If the compensation due from the bankrupt employer is only partially recoverable from the insurers, the workman must prove in the bankruptcy for the balance, and take his dividend with the other unsecured creditors (sub-s. 2).

(2) *Where the bankrupt employer has not insured*, sub-ss. 3, 4 and 5 apply, and the workman is entitled to claim his compensation, up to the amount of £100, as ranking *pari passu* with those debts which in the case of bankruptcy or liquidation must be paid in priority to other debts. Owing to the passing of the Companies (Consolidation) Act, 1908, some of the Acts mentioned in the section are no longer applicable.

So far as they relate to companies the Preferential Payments in Bankruptcy Act, 1888, ss. 1, 2 and 3, the Preferential Payments in Bankruptcy (Ireland) Act, 1889, s. 4, and the whole of the Preferential Payments in Bankruptcy Amendment Act, 1897, have been repealed by the Companies (Consolidation) Act, 1908, ss. 107 and 209, which now contain the statutory provisions on the subject. The Stannaries Act, 1887, has been modified by s. 240 of the Companies Consolidation Act, 1908.

Where the compensation consists of a weekly sum, the amount due in respect of it must be ascertained as if the liability therefore was being redeemed by the employer under Schedule I. (17) (*Re J., an Arranging Debtor, Ex parte Reid* [2380]). When an application is made, the county court judge has apparently only jurisdiction to assess the sum payable and not to order payment (*Homer v. Gough* [2381]).

For procedure, see Workmen's Compensation Rules, 1913, rule 37.

2376.—King v. Phoenix Assurance Co., [1910] 2 K. B. 666 ; 80 L. J. K. B. 44 ; 103 L. T. 53—C. A.

A girl was employed by a company, and in the course of her employment met with a serious accident. The company did not dispute their liability, and paid compensation until winding-up proceedings were commenced. They had a policy of insurance which contained a clause that any dispute between the insured and the insurers should be referred to arbitration under the Arbitration Act, 1889, and that an award in favour of the insured should be a condition precedent to any right of action against the insurers. The girl applied to the county court under s. 5, sub-s. 1, of the Workmen's Compensation Act, 1906, for an order that the insurers should continue the payment of compensation. The insurers denied liability on the ground that the policy had become invalid through a breach of its conditions by the employers.

HELD (affirming the county court judge, who decided that there was a dispute between the parties, and that in the circumstances he had at present no jurisdiction in the matter)—that s. 5, sub-s. 1, of the Act of 1906 merely enabled the applicant, by way of subrogation, to stand in the position of the employers, and that, consequently, until there had been a submission to arbitration under the Arbitration Act, 1889, and an award, as provided by the policy, the applicant was not entitled to claim any payment from the insurers.

Notes.—Cozens-Hardy, M.R., in referring to the effect of sub-ss. 1 and 2 of s. 5, said : “ I am quite unable to read that section as having any other operation or effect than this—that it, by way of subrogation, enables the workman to stand in the shoes of the employer with reference to the insurance company. It is a little more than that, because it prevents any claim on behalf of the general creditors, and is therefore a subrogation protected against the claims of creditors or other persons under the bankruptcy or winding-up. But unless the employer was in a position to make a claim under the policy against the insurance company, I find no word in that section which lends any countenance to the suggestion that the workman can be in any better or different position. The only thing that is transferred is this, that ‘ the rights of the employer against the insurers as respects that liability shall be transferred to and vest in the workman ’ ; but it goes on to say that ‘ the insurers shall not be under any greater liability to the workman than they would have been under to the employer. ’ ‘ Greater ’ cannot mean merely more pounds, shillings, and pence. It is a ‘ greater liability ’ imposed upon an insurance company if they are liable to pay in a different event, or more speedily than they would under the contract between them and the employers themselves.”

2377.—Daff v. Midland Colliery Owners' Mutual Indemnity Co. (1913), 57 S. J. 773 ; 29 T. L. R. 730 ; [1913] W. C. & I. Rep. 649—H. L.

One of the objects of a mutual insurance society was to indemnify the members against claims in respect of any accident resulting in

injury to any workman employed at any mine in which any member of the society was interested. The articles of association provided that upon failure by a member to observe any regulation of the company the directors might determine his protection in respect of any mine, and that upon such determination he should not be entitled to any indemnity "in respect of any accident." The protection of a colliery company which was a member of the society was duly determined. Before such determination the colliery company had become liable under the Workmen's Compensation Act, 1906, to compensate a workman in their employment. The colliery company went into liquidation. Later the workman, under s. 5, sub-s. 1, of the Act, claimed compensation from the respondent company on the ground that they were still liable to the colliery company, and so to him. The county court judge and the Court of Appeal held that the respondent company were within their rights in determining the protection of the colliery company. On appeal—

HELD—that in the circumstances the respondent company were not entitled to pass a resolution purporting to determine the colliery company's membership and protection, and therefore, that the arbitration on the appellants' claim must be proceeded with.

Notes.—*King v. Phoenix Assurance Co.* [2376] approved.

2378.—*Kniveton v. Northern Employers' Mutual Indemnity Co.*, [1902] 1 K. B. 880 ; 18 T. L. R. 504—Div. Ct.

Under s. 5 of the Workmen's Compensation Act, 1897, there is a statutory subrogation of the workman to the rights of the employer.

Notes.—This case also decided that an appeal lies to the King's Bench Division against any order by a county court judge under s. 5 of the 1897 Act, applying *Leech v. Life and Health Assurance Association*, [1901] 1 K. B. 707 [2856], on this point. But under the Act of 1906 an appeal lies direct to the Court of Appeal, where the judge "gives any decision or makes any order under this Act." See Schedule II. (4), sub-tit. "Appeals."

2379.—*Morris v. Northern Employers' Mutual Indemnity Co.*, [1902] 2 K. B. 165 ; 71 L. J. K. B. 733 ; 86 L. T. 748 ; 50 W. R. 545 ; 66 J. P. 644 ; 18 T. L. R. 635—C. A.

HELD (in the Divisional Court)—the effect of s. 5 of the Workmen's Compensation Act, 1897, is to subrogate the workman to the rights of the employer against his insurers ; the workman has no larger rights against the insurers than the employer has.

HELD FURTHER (in the Court of Appeal)—that an appeal lies to the King's Bench Division against an order made by a county court judge under s. 5 of the Workmen's Compensation Act, 1897.

Notes.—*Leech v. Life and Health Assurance Association*, [1901] 1 K. B. 707 [2156], referred to in the Court of Appeal. *Kniveton v. Northern Employers' Mutual Indemnity Co.* [2378] applied in the Divisional Court. See also *Wilkinson v. Car and General Insurance Corporation*, 108 L. T. 512 [1811]. An appeal would now lie to the

Court of Appeal. See note to *Kniveton v. Northern Employers' Mutual Indemnity Co.* [2378].

2380.—Re J., an Arranging Debtor, Ex parte Reid (1911), 45 Ir. L. T. R. 247—K. B. D., in Bankruptcy (Ir.).

Where the employer of a workman who had obtained compensation under the Workmen's Compensation Act, 1906, had become an arranging debtor, on an application by the workman to the judge in bankruptcy :

The court made an order that the official assignee should, out of the money in court, lodge to the credit of the workmen's compensation matter in the county court a sum sufficient to purchase a Post Office Savings Bank life annuity equal in amount to 75 per cent. of the annual value of the weekly payment which had been awarded to the workman, to abide such order as the county court judge should make in relation thereto.

Notes.—The court thus dealt with the matter as if it was an application by an employer for redemption under Schedule I. (17).

2381.—Homer v. Gough, [1912] 2 K. B. 303 ; 81 L. J. K. B. 261 ; 105 L. T. 732 ; 5 B. W. C. C. 51 ; [1912] W. C. Rep. 30—C. A.

Under a power in a debenture deed of a company a receiver and manager was appointed, and shortly afterwards there was a voluntary winding-up of the company. An application was then made under s. 5 of the Workmen's Compensation Act, 1906, by a workman who had obtained an award against the company for a weekly payment as compensation for an accident, to have a commuted sum assessed in place of the weekly payment, and an order was made that the liquidator "do pay" the workman £100.

The liquidator appealed to the Court of Appeal.

HELD—that the appeal was not an appeal under the Workmen's Compensation Act, 1906, and did not lie to the Court of Appeal direct, but that the question must be decided in the winding-up.

Semble, the county court judge had jurisdiction only to assess the sum payable and not to order payment.

REMEDIES BOTH AGAINST EMPLOYER AND STRANGER.

Sect. 6.—Where the injury for which compensation is payable under this Act was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof—

- (1) The workman may take proceedings both against that person to recover damages and against any person liable to pay compensation under this Act for such compensation, but shall not be entitled to recover both damages and compensation; and
- (2) If the workman has recovered compensation under this Act, the person by whom the compensation was paid, and any person who has been called on to pay an indemnity under the section of this Act relating to sub-contracting, shall be entitled to be indemnified by the person so liable to pay damages as aforesaid, and all questions as to the right to and amount of any such indemnity shall, in default of agreement, be settled by action, or, by consent of the parties, by arbitration under this Act.

This section gives to the workman a double remedy in cases where he suffers injury owing to the tortious act of a stranger. In such a case the workman may claim compensation against his employer, and proceed by action against the wrongdoer. If he fails in his action he may claim compensation or *vice versâ*, but he “shall not be entitled to recover both damages and compensation.” Thus if he obtains an award under the Act, he will not be able to sue the stranger for damages for loss of wages and pain and suffering, although these were not included in the compensation (*Tong v. Great Northern Railway* [2382]), nor for loss which he has sustained whilst engaged in a different occupation (*Woodcock v. London and North Western Railway* [2383]). Where the injury is caused by the negligence of a fellow workman, the employer is entitled to claim from the fellow workman the compensation which has been duly paid to the injured man (*Lees v. Dunkerley Brothers* [2384]). It appears from this decision that the doctrine of common employment does not apply between fellow workmen. It is not necessary, in order that the workman should be deprived of his right to compensation, that legal proceedings should have been actually commenced against a person who is not the employer, for sub-s. 1 operates where a claim is made against such person for negligence and acted upon, as the word “recover” in the sub-section is not limited to recover by virtue of legal proceedings; it is sufficient if the workman has claimed compensation and received it (*Page v. Burtwell* [2385]). Thus if a workman

claims damages against a third party, and receives a payment in settlement, he will be deprived of his right to claim compensation from his employer (*Murray v. North British Railway* [2386]; *Mulligan v. Dick* [2387]). Similarly, if the workman accepts compensation under the Act, and the acceptance is not qualified, he will be precluded from claiming damages against a stranger; but payments accepted from the employer "without prejudice," will not debar the workman from maintaining his common law action against a third party (*Oliver v. Nautilus Shipping Co.* [2388]; *Wright v. Lindsay* [2389]; see also *Mahomed v. Maunsell* [2390]). A workman will not be bound by a written receipt, if he did not understand its effect at the time when he signed it (*Huckle v. London County Council* [2391]). The right to be indemnified by the stranger is given to the person who has paid the compensation or to anyone who has had to pay an indemnity under s. 4 of the Act of 1906. The matter may be settled by action or by arbitration under the Act, if the parties agree (*Bate v. Worsey* [2392]). Sometimes compensation may have to be paid under the Act for an injury caused by a stranger against whom there would be no right of action (*Kemp and Dougall v. Darngavil Coal Co.* [2393]; *Lankester v. Miller* [2394]). But if it is once established that there was a legal liability on the part of the stranger to the workman, there will be a right of indemnity, although the liability of the stranger may have ceased (*Smith's Dock Co. v. Readhead* [2395]). There will be no right of indemnity where the damage is too remote (*Bradley v. Wallaces* [2396]). The indemnity includes the costs of the compensation proceedings (*Great Northern Railway v. Whitehead* [2397]). An employer tort-feasor has no right of indemnity against a third party joint tort-feasor (*Cory v. Fenwick* [2398]). An indemnity may be claimed even where the compensation payable under the Act has been settled by agreement between the employer and workman (*Thompson v. North Eastern Marine Engineering Co.* [2399]). The question of negligence is one of fact (*Cutsforth v. Johnson* [2400]). The claim for an indemnity may be made in an Admiralty action (*The Annie* [2401]; *The Rigel* [2402]). As to the effect of not serving upon the third party notice of the claim see *Nettleingham v. Powell* [2403].

For procedure, See Workmen's Compensation Rules, 1913, rules 25, 26.

2382.—Tong v. Great Northern Railway (1902), 86 L. T. 802; 66 J. P. 677; 18 T. L. R. 566—Wright, J.

A workman, having been injured in the course of his employment by the negligence of a third person, obtained an award under the Workmen's Compensation Act, 1897, against his employer. He then brought an action against the third person claiming damages for pain and suffering, and the expenses he had been put to, and the balance of his wages.

HELD—that the action would not lie by virtue of s. 6 of the Workmen's Compensation Act, 1897.

2383.—Woodcock v. London and North Western Railway, [1913] 3 K. B. 139; 82 L. J. K. B. 921; [1913] W. C. & I. Rep. 563; 29 T. L. R. 566; 6 B. W. C. C. 471—Rowlatt, J.

The plaintiff, who was employed by a colliery company, occupied himself in his leisure time in the cultivation of a plot of land as a farmer. In the course of his work for the colliery company he was injured by accident owing to the negligence of the defendants. He was paid compensation by his employers under the Workmen's Compensation Act, 1906, but he claimed to be entitled to recover from the defendants the loss he had sustained in his capacity of farmer.

HELD—that, having received compensation, he was precluded by s. 6 of the Act from maintaining an action for damages arising out of the same injury.

Notes.—In his judgment Rowlatt, J., said: "It was assumed on both sides—no doubt properly and wisely—that his profits as a farmer could not be taken into consideration in arriving at his weekly earnings for the purpose of compensation. I am not deciding in the present case . . . that he could not have in some way brought in under his claim for compensation his earnings as a farmer, nor am I desirous of its being thought that I am saying that he could have done so." After considering the effect of s. 1, sub-s. 2 (b), and s. 6, his Lordship continued: "The right to recover damages in respect of a personal injury is one indivisible right, and when the statute says the workman is not entitled to recover damages—unless it divides the right to recover damages—it must mean that he is barred of his remedy for any common law damages which flow from the injury which he has traced to the negligence of the defendants."

2384.—Lees v. Dunkerley Brothers, [1911] A. C. 5; 80 L. J. K. B. 135; 103 L. T. 467; 55 S. J. 44; 4 B. W. C. C. 115; 48 Sc. L. R. 724—H. L.

When a workman has been injured by an accident arising out of and in the course of his employment, caused by negligence on the part of a fellow workman, and compensation has been duly paid to the injured workman by his employer, the latter is entitled to be indemnified by the fellow workman, as the words "some person

other than the employer" in s. 6 of the Workmen's Compensation Act, 1906, include a fellow workman of the injured workman.

The doctrine of common employment has no application as between fellow workmen.

Notes.—*Dictum* of Pollock, C.B., in *Southcote v. Stanley* (1856), 1 H. & N. 247, 250, "that there is no liability in one servant towards another in respect of negligence in a common employment," disapproved. *Wright v. Roxburgh*, 2 M. 748, explained.

Decision of C. A. (*sub nom. Gibson v. Dunkerley Brothers, Lees and Sykes, Third Parties*, 102 L. T. 587; 3 B. W. C. C. 345) affirmed.

Lord Loreburn, L.C., in his judgment said: "We are asked to extend, or rather to distort the doctrine of *Priestley v. Fowler*, 3 M. & W. 1 [2980]. I have no desire to extend that doctrine, but I must point out that in that case the court implied a term in a real contract, whereas in the present case we are asked to imply a contract where it is perfectly obvious there is no contract at all, namely, in the relation between two fellow servants. . . . It may be right or wrong to say, as *Priestley v. Fowler* says, that a man is not to be responsible for the negligence of his agents. That is decided law, and I make no comment upon it. But it is a very different proposition to say that a man is not to be responsible for his own negligence."

2385.—*Page v. Burtwell*, [1908] 2 K. B. 758; 77 L. J. K. B. 1060; 99 L. T. 542—C. A.

In s. 6 of the Workmen's Compensation Act, 1906, the words "circumstances creating a legal liability" mean not merely circumstances which in fact create a legal liability, but circumstances which it is alleged create that liability and are the foundation of an action for negligence. Where a workman has, or asserts he has, a right against his own employer under the Act, and has, or asserts he has, a right against somebody else, not his employer, based upon negligence, he is not under sub-s. 1 bound to exercise his option in the first instance, as was the case under the Act of 1897, but he may take proceedings concurrently, and if he does he cannot recover both damages and compensation. "Proceedings" in the sub-section do not mean only legal proceedings actually commenced against a person who is not the employer; and the section operates where a claim is made against such a person for negligence, under which claim compensation in the nature of damages—not damages—is paid by that person without any writ issued and upon terms that no writ should issue. The word "recover" in the sub-section is not limited to recover by virtue of legal proceedings; it is sufficient if the workman has claimed compensation and received it.

A workman employed by a contractor to re-lay wood blocks on the premises of a company was working on a concrete slab covering a trench, when the slab gave way and he was injured. He demanded from the company damages for the injury, but did not resort to legal proceedings. The company denied any legal liability, but offered to pay him certain sums of money if he agreed not to make any claim against them. He accepted the offer, and duly received the moneys. He subsequently commenced proceedings under the

Workmen's Compensation Act, 1906, against his employer, the contractor.

HELD—that the applicant had taken proceedings against, and had recovered damages from, the company within s. 6, sub-s. 1, of the Act, and that consequently he was not entitled to recover compensation from his employer.

Notes.—Observations of Vaughan Williams, L.J., in *Oliver v. Nautilus Steam Shipping Co.* [2388], that “if there is a payment and a receipt of money under the Workmen's Compensation Act, and that receipt is in no way qualified, I think that is sufficient to bring the case within the operation of s. 6, and put the workman in the position of having proceeded against his employer for compensation, and recovered it,” applied.

2386.—*Murray v. North British Railway* (1904), 6 F. 540; 41 Sc. L. R. 383—Ct. of Sess.

A workman in the employment of carting contractors was injured while employed under a contract between the contractors and a railway company, who were undertakers in the sense of the Act. The workman, under reservation of all claims he might have for compensation against other parties, asked for and accepted from the contractors a payment in full of all claims against them under any statute or at common law in respect of the injury. He afterwards claimed compensation under the Act from the railway company as undertakers.

HELD—that the word “employer” in the sense of s. 6 of the Act means “undertaker” in the sense of the Act, and consequently that the workman, in respect of the payment by the contractors, was barred by the terms of s. 6 from thereafter claiming compensation under the Act from the undertakers.

2387.—*Mulligan v. Dick* (1903), 6 F. 126; 41 Sc. L. R. 77—Ct. of Sess.

An injured workman claimed damages at common law against a person other than his employers, and without having taken legal proceedings received a payment in settlement of his claim.

HELD (in a claim for compensation under the Workmen's Compensation Act, 1897, by the workman against his employers)—that he had “proceeded” against a third party within the meaning of s. 6 of the Act, and that therefore he had exercised his option and was barred from claiming compensation against his employers.

HELD ALSO—that a clause in the receipt granted by him reserving a right to claim compensation from his employers did not prevent this result.

Notes.—*Oliver v. Nautilus Steam Shipping Co.* [2388] distinguished. *Muir v. Crawford*, 2 R. (H. L.) 143, referred to.

2388.—*Oliver v. Nautilus Steam Shipping Co.*, [1903] 2 K. B. 639; 72 L. J. K. B. 857; 89 L. T. 318; 52 W. R. 200; 9 Asp. M. C. 436; 19 T. L. R. 607—C. A.

The plaintiff met with an accident through the negligence of the defendants, on whose ship he was working under the orders of his employers. The plaintiff gave notice of his accident to his employers and signed receipts for money received from them "on account of compensation which may be or become due to me under the Workmen's Compensation Act, 1897"; but after giving the first receipt, in pursuance of advice given to him by the delegate of his trade union, the plaintiff said he could only accept payments "without prejudice." The plaintiff subsequently refused to accept any further payments from his employers, and brought this action against the defendants, in which negligence was admitted and the damages agreed subject to the question of the defendants' liability under s. 6 of the Act.

HELD—that the plaintiff had not so exercised his option under s. 6, of proceeding against his employers for compensation under the Act, as to be debarred from maintaining his common-law action against the defendants.

Per Vaughan Williams, L.J.: "If there is a payment and a receipt of money under the Act of 1897, and that receipt is in no way qualified, that is sufficient to bring the case within the operation of s. 6 and to put the workman in the position of having proceeded against his employer for compensation and recovered it."

Per Romer, L.J. "Proceedings by a workman against his employer should not be held to irrevocably bind the workman in the exercise of his option under s. 6, unless they have resulted in some compensation, as such, being paid to and received by the workman in such a manner as to bind both parties."

Notes.—*Rendall v. Hill's Dry Dock, etc., Co.*, [1900] 2 Q. B. 245 [2294], discussed. *Little v. MacLellan*, 2 F. 387 [2144], distinguished. *Wright v. Bagnall*, [1900] 2 Q. B. 240 [2290], and *Beckley v. Scott*, [1902] 2 Ir. R. 504 [2150], referred to.

2389.—*Wright v. Lindsay*, [1912] S. C. 189; 49 Sc. L. R. 210; 5 B. W. C. C. 531—Ct. of Sess.

A workman, having been injured by collision with a motor car, received from his employers compensation which he accepted under reservation of claims against third parties, and on the understanding that he would make repayment if he recovered damages. He thereafter brought an action of damages against the owners of the car.

HELD—that he had not "recovered" compensation in the sense of s. 6 of the Workmen's Compensation Act, 1906, and was entitled to maintain such action of damages.

Notes.—*Oliver v. Nautilus Steam Shipping Co.* [2388] applied. *Mulligan v. Dick* [2387] distinguished.

2390.—Mahomed v. Maunsell (1907), 1 B. W. C. C. 269—County Court.

A workman employed by the "V." company sued the defendant in the county court at common law for damages for personal injury alleged to be due to the negligence of defendant's servant. Defence, that the workman had recovered compensation since the accident from his own employer, and was precluded from claiming both damages and compensation by s. 6, sub-s. 1, of the Act. The workman had not made a claim in express words, but had received from his employer the sum of 4*l.* 3*s.* 4*d.*, composed of the maximum weekly payments to which he could be entitled under the Act. He had given weekly receipts for "sick pay," and a final receipt "in full discharge of all claims against his employers."

HELD—that notwithstanding the workman would have been entitled to obtain as damages from the defendant a greater sum than he had received as compensation, he had "recovered compensation" within the meaning of s. 6, sub-s. 1, of the Workmen's Compensation Act, 1906, and was not entitled to succeed in the action.

Notes.—*Oliver v. Nautilus Steamship Co.* [2388] applied. *Edwards v. Godfrey*, [1899] 2 Q. B. 333 [2154]; *Beckley v. Scott*, [1902] 2 Ir. R. 504 [2150]; *Taylor v. Hamstead Colliery*, [1904] 1 K. B. 38 [2153]; *Rouse v. Dixon*, [1904] 2 K. B. 628 [2149], referred to.

2391.—Huckle v. London County Council (1910), 27 T. L. R. 112; 4 B. W. C. C. 113—C. A.

The plaintiff, who met with an accident in the course of his employment, owing, as he alleged, to the negligence of the defendants' servants, the defendants not being the plaintiff's employers, accepted several weekly payments from his employers, and gave them receipts therefor in the following terms: "Received under the Workmen's Compensation Act, 1906 . . . the sum of 12*s.* 8*d.*, being compensation at the rate of one half my average weekly wages up to . . . in respect of an accident which occurred to me on or about April 17th, 1909." Subsequently the plaintiff repaid to his employers the amounts he had received from them, and then sued the defendants for damages. At the trial the plaintiff stated that he did not understand the nature and terms of the receipts he had signed. The county court judge nonsuited the plaintiff, holding, as a matter of law, that the plaintiff had recovered compensation within the meaning of s. 6 of the Workmen's Compensation Act, 1906, and that his action was therefore barred.

HELD—that the county court judge was wrong in nonsuiting the plaintiff, as it was a question for the jury whether the plaintiff understood the nature and effect of the receipts he had signed.

2392.—Bate v. Worsey (Bayliss, Third Party) (1912), 5 B. W. C. C. 276; [1912] W. C. Rep. 194—C. A.

A cattle driver was knocked down and killed by a motor car. His dependant claimed compensation from the employer. The

motorist, who was cited as third party, consented to the question of his liability to indemnify the employer being settled by arbitration under the Act. The county court judge awarded compensation, and finding that the negligence of the third party had caused the accident, ordered him to indemnify the employer. The third party appealed on the ground that there was no evidence of negligence.

HELD—there was evidence to support the finding.

2393.—Kemp and Dougall v. Darngavil Coal Co., [1909] S. C. 1314; 46 Sc. L. R. 939—Ct. of Sess.

A colliery company contracted with a railway company for the carriage of coals to a vessel at G., to be delivered alongside the vessel. The coals were conveyed in waggons hired for the purposes of the colliery from a firm of waggon builders. At the docks, which belonged to the railway company, the waggons were taken over by a firm of stevedores for the purpose of loading the ship, under a contract between them and the railway company. To load the ship the waggons had to be run up a gradient on to a platform and there tipped. One of the stevedores' workmen, who was engaged in running a waggon down again to the railway lines, was injured through a defect in the brake of the waggon. The workman having recovered compensation under the Workmen's Compensation Act, 1906, from his employers, they claimed relief from the colliery company on the ground that it was in fault in supplying a defective waggon.

HELD—that as the operation in which the workman was injured was outside the contract in which the colliery company was interested, there was no relation of duty on its part towards the injured workman, and that the colliery company must therefore be assoltized.

Notes.—*Caledonian Railway Co. v. Warwick* (1897), 25 R. (H. L.) 1, followed. *Elliott v. Hall*, 15 Q. B. D. 315, distinguished. *Indermaur v. Dames*, L. R. 1 C. P. 274; *Heaven v. Pender*, L. R. 11 Q. B. D. 503; *Parry v. Smith*, L. R. 4 C. P. D. 325, referred to.

2394.—Lankester v. Miller (Hetherington, Third Party) (1910), 4 B. W. C. C. 80.

The driver of a motor car, knowing that his horn was out of order, slowed down to six miles an hour when nearing a cart and horse. The horse became frightened and bolted, and the driver was thrown and fatally injured. The dependant claimed compensation from the master, who brought in the motor car driver as a third party.

The county court judge found that the damage to the horn was not the cause of the accident, and that it was not negligence on the part of the driver of the car to continue running on the road with the horn silent. The widow of the deceased could not therefore have maintained an action against the owner of the car under Lord Campbell's Act. Accordingly he dismissed the respondent's claim for indemnity.

HELD—there was evidence to support the findings. The mere breach of regulations made under the Motor Act, 1903, is not necessarily evidence of negligence.

2395.—Smith's Dock Co., Ltd. v. John Readhead & Sons, Ltd., [1912] 2 K. B. 323; 81 L. J. K. B. 808; 106 L. T. 843; 28 T. L. R. 397; 5 B. W. C. C. 450; [1912] W. C. Rep. 217—Bray, J.

A workman in the service of the plaintiffs was injured in the course of his employment by reason of the negligence of the defendants' servants, and four days afterwards he died from the effects of his injuries. His illegitimate daughter, who was his only dependant, took proceedings against the plaintiffs and recovered compensation under the Workmen's Compensation Act, 1906. The plaintiffs then sued the defendants, claiming to be indemnified under s. 6 of the Workmen's Compensation Act, 1906. For the defendants it was contended that, as no action could be maintained under Lord Campbell's Act for the benefit of the illegitimate daughter, s. 6 did not apply.

HELD—that under the earlier words of s. 6 there was a legal liability created in the defendants; that there was nothing in the later words of the section to diminish the effect of the earlier words; and therefore the plaintiffs were entitled to be indemnified by the defendants.

Notes.—In his judgment Bray, J., said: "It is true that under Lord Campbell's Act the man's daughter would have had no right of action against the defendants for damages, for she was illegitimate . . . Under those circumstances the question arises whether the plaintiffs are entitled to the indemnity claimed . . . Here the injury was so caused under circumstances creating a legal liability in persons other than the employers, namely in the defendants, and the person to whom they were so liable to pay damages was the workman whose injury was caused by their negligence, and that liability was not the less created because it subsequently came to an end by reason of the man's death."

2396.—Bradley v. Wallaces (1913), 82 L. J. K. B. 1074; 109 L. T. 281; 29 T. L. R. 705; [1913] W. C. & I. Rep. 620—C. A.

Whilst engaged in his work at his employer's yard, a workman was kicked and fatally injured by a horse which belonged to a third party and was standing there unattended. The horse was not known by its owner to be vicious.

HELD—that, even assuming that the horse was a trespasser in the yard and had been left there unattended by the negligence of its owner, the employers were not entitled to be indemnified by him under s. 6 of the Workmen's Compensation Act, 1906, in respect of their liability to pay compensation to the dependants of the deceased workman. In the case of a horse not known to be vicious it was not the natural consequence of leaving it unattended in the yard that it should kick the workman, and the damage was therefore too remote and the owner of the horse not liable.

Notes.—*Cox v. Burbidge*, 32 L. J. C. P. 89; 13 C. B. N. S. 430, followed.

2397.—Great Northern Railway v. Whitehead & Co. (1902), 18 T. L. R. 816—Darling, J.

Where an employer is entitled, under s. 6 of the Workmen's Compensation Act, 1897, to indemnity from a third person in respect of compensation payable to a workman for an injury for which that third person is liable, the indemnity includes the cost of the compensation proceedings as well as the amount of the compensation awarded.

2398.—Cory & Sons, Ltd. v. France, Fenwick & Co., Ltd., [1911] 1 K. B. 114; 80 L. J. K. B. 341; 103 L. T. 649; 27 T. L. R. 18; 55 S. J. 10; 11 Asp. M. C. 499—C. A.

If an accident to a workman is caused by the negligence of his employers and of a third party, and the workman recovers compensation from his employers under the Workmen's Compensation Act, 1906, the employers are not entitled, under s. 6 of the Act, to an indemnity from such third party.

Notes.—*Rigby v. Hewitt* (1850), 5 Ex. 240; *Greenland v. Chaplin* (1850), 5 Ex. 243; *The Calliope*, [1891] A. C. 11; *Clark v. Chambers* (1878), 3 Q. B. D. 327; *Sharp v. Powell* (1872), L. R. 7 C. P. 253; *Thorgood v. Bryan* (1849), 8 C. B. 115; *Reg. v. Harries* (1847), 2 Car. & K. 364, referred to.

2399.—Thompson v. North Eastern Marine Engineering Co., [1903] 1 K. B. 428; 72 L. J. K. B. 222; 88 L. T. 239; 19 T. L. R. 206—Kennedy, J.

By s. 6 of the Workmen's Compensation Act, 1897, a workman may under certain circumstances "proceed" either against his employer for compensation or against a third person for damages, and "if compensation be paid under this Act" the employer is entitled to be indemnified by the third person.

HELD—that compensation may be "paid under this Act" within the meaning of s. 6, although it is paid under an agreement between the workman and his employer, and not under an award in an arbitration.

Semble, a workman "proceeds" against his employer within the meaning of s. 6 when he gives notice of claim under s. 2, sub-s. 1, of the Act.

Notes.—*Powell v. Main Colliery Co.,* [1900] A. C. 366 [2279]; *Field v. Longden,* [1902] 1 K. B., at p. 55 [2179]; *Perry v. Clements,* 17 T. L. R. 525 [2387], referred to.

2400.—Cutsforth v. Johnson, [1913] W. C. & I. Rep. 131; 108 L. T. 138; 6 B. W. C. C. 28—C. A.

A workman, a lad about sixteen years of age, was seated with his employer's son in his employer's cart. The son got down to attend to some business on one side of a railway line running alongside certain docks. The workman then got down for his own private and necessary purpose. He crossed the railway line, which was on the

other side of the road. He passed through an opening in a sort of passage between heaps of boxes and went behind those boxes. On his return in a short time he ran out from the opening by which he had entered, and when he was in the act of crossing the railway line, not having looked either to the right hand or to the left, he was knocked down by an engine belonging to a railway company and was seriously injured. The railway company were served with notice by the employer under s. 6 of the Workmen's Compensation Act, 1906. The deputy county court judge found that there was evidence of negligence on the part of the railway company. He ruled that there was no evidence of contributory negligence such as would disentitle the workman to recover compensation. The railway company appealed.

HELD—that, on the question of contributory negligence, the circumstances were such that the case fell rather within *Dublin, Wicklow, and Wexford Railway v. Slattery*, 3 App. Cas. 1155, than within *Davey v. London and South Western Railway*, 52 L. J. Q. B. 665; 11 Q. B. D. 213; and that it being a question of fact and not a question of law, it was not competent for the court to do other than accept the finding of the learned judge.

Notes.—In his judgment Cozens-Hardy, M.R., said: "The action in substance, though not in form, is an action brought by the infant, suing by his next friend, against the railway company, claiming damages on the ground of negligence. I say, in substance, though not in form, and it makes a very great difference. If this had been an action brought by the infant suing by his next friend in the High Court against the railway company for negligence, and the evidence had been given substantially as it appears in the judge's notes, I should as at present advised, have thought that there was a clear case for a new trial, the judgment, so far as I can gather, being one which is not supported by the evidence. But that is really not material. We are not, in appeals under the Workmen's Compensation Act, 1906, judges of fact."

2401.—*The Annie*, [1909] P. 176; 78 L. J. P. 81; 100 L. T. 415; 11 Asp. M. C. 213; 25 T. L. R. 416—Bargrave Deane, J.

Owing to the collision the anchor of the defendants' vessel fouled the painter of the boat which was towing astern of the plaintiff's vessel. In order to clear the vessels, the master of the plaintiff's vessel cut the painter, but held on to the rope and was dragged overboard and drowned. The plaintiff had paid compensation to the dependants of the master under the Workmen's Compensation Act, 1906, and claimed under s. 6 of that Act to recover an indemnity for such compensation from the defendants in this action, which was brought *in personam* under common law jurisdiction, the collision having taken place within the body of a county.

HELD—that the claim for repayment of compensation was not too remote as a matter of damages, and was recoverable in this action.

Notes.—*The Priscilla*, L. R. 3 A. & E. 125, distinguished. See also *The Rigel* [2402].

2402.—**The Rigel**, [1912] P. 99 ; 81 L. J. P. 86 ; 106 L. T. 648 ; 28 T. L. R. 251 ; [1912] W. C. Rep. 351—Bargrave Deane, J.

By a collision which took place between the plaintiffs' and the defendants' vessels the defendants' vessel was damaged. In an action *in rem* by the plaintiffs, in which the defendants admitted liability for the collision, the plaintiffs claimed *inter alia* to be indemnified in respect of a sum paid by them under the Workmen's Compensation Act, 1906, to a seaman on their vessel who had sustained nervous shock owing to fright, not by the collision itself, but before the collision actually occurred, when he saw the defendants' vessel looming out of the fog and bearing down on the plaintiffs' vessel. The seaman was not physically injured. The defendants were not parties to the proceedings under the Workmen's Compensation Act.

HELD—that the damage was too remote.

Notes.—*The Annie* [2401] ; *Dulieu v. White*, [1901] 2 K. B. 669, and other cases referred to.

2403.—**Nettleingham v. Powell**, [1913] 3 K. B. 209 ; 82 L. J. K. B. 911 ; [1913] W. C. & I. Rep. 424 ; 108 L. T. 912 ; 57 S. J. 593 ; 29 T. L. R. 577 ; 6 B. W. C. C. 479—C. A.

Where an injury to a workman is caused in circumstances creating a legal liability in a person other than his employer to pay damages in respect thereof, and the workman has received compensation under the Workmen's Compensation Act, 1906, from his employer, the employer is entitled, under s. 6 of the Workmen's Compensation Act, 1906, to bring an action against such third party for an indemnity, notwithstanding that he has not served upon such third party the notice of his claim as required by rules 19 and 24 of the Workmen's Compensation Rules, 1907 to 1911. The only effect of not giving such notice is that the third party is not bound by the decision in the arbitration in the county court, and that the employer has to prove his claim strictly against such third party.

APPLICATION OF ACT TO SEAMEN.

Sect. 7.—(1) This Act shall apply to masters, seamen, and apprentices to the sea service and apprentices in the sea-fishing service, provided that such persons are workmen within the meaning of this Act, and are members of the crew of any ship registered in the United Kingdom, or of any other British ship or vessel of which the owner, or (if there is more than one owner) the managing owner, or manager resides or has his principal place of business in the United Kingdom, subject to the following modifications :—

- (a) The notice of accident and the claim for compensation may, except where the person injured is the master, be served on the master of the ship as if he were the employer, but where the accident happened and the incapacity commenced on board the ship it shall not be necessary to give any notice of the accident :
- (b) In the case of the death of the master, seaman, or apprentice, the claim for compensation shall be made within six months after news of the death has been received by the claimant :
- (c) Where an injured master, seaman, or apprentice is discharged or left behind in a British possession or in a foreign country, depositions respecting the circumstances and nature of the injury may be taken by any judge or magistrate in the British possession, and by any British consular officer in the foreign country, and if so taken shall be transmitted by the person by whom they are taken to the Board of Trade, and such depositions or certified copies thereof shall in any proceedings for enforcing the claim be admissible in evidence as provided by sections six hundred and ninety-one and six hundred and ninety-five of the Merchant Shipping Act, 1894, and those sections shall apply accordingly :
- (d) In the case of the death of a master, seaman, or apprentice, leaving no dependants, no compensation shall be payable, if the owner of the ship is under the Merchant Shipping Act, 1894, liable to pay the expenses of burial :
- (e) The weekly payment shall not be payable in respect of the period during which the owner of the ship is, under the Merchant Shipping Act, 1894, as amended by any subsequent enactment, or otherwise, liable to defray the expenses of maintenance of the injured master, seaman, or apprentice :
- (f) Any sum payable by way of compensation by the owner of a ship under this Act shall be paid in full notwithstanding anything in section five hundred and three of the Merchant Shipping Act, 1894 (which relates to the limitation of a shipowner's liability in certain cases of loss of life, injury, or damage), but the limitation on the owner's liability imposed by that section shall apply to the amount recoverable by

way of indemnity under the section of this Act relating to remedies both against employer and stranger as if the indemnity were damages for loss of life or personal injury:

- (g) Sub-sections (2) and (3) of section one hundred and seventy-four of the Merchant Shipping Act, 1894 (which relates to the recovery of wages of seamen lost with their ship), shall apply as respects proceedings for the recovery of compensation by dependants of masters, seamen, and apprentices lost with their ship as they apply with respect to proceedings for the recovery of wages due to seamen and apprentices; and proceedings for the recovery of compensation shall in such a case be maintainable if the claim is made within eighteen months of the date at which the ship is deemed to have been lost with all hands.

(2) This Act shall not apply to such members of the crew of a fishing vessel as are remunerated by shares in the profits or the gross earnings of the working of such vessel.

(3) This section shall extend to pilots to whom Part X. of the Merchant Shipping Act, 1894, applies, as if a pilot when employed on any such ship as aforesaid were a seaman and a member of the crew.

Application of Act to Seamen.

The effect of this section is to extend the benefits of the Act to any person engaged in any capacity on a British ship used in navigation. Although seamen are within the meaning of the word "workman" in s. 13, the insertion of this section is necessary to cover cases of injury to seamen whilst on the high seas, as the Act does not extend beyond the territorial limits of the United Kingdom. To bring a person within the special provisions of s. 7, he must be—

(i.) A master, or a seaman, or an apprentice to the sea service, or the sea fishing service.

(ii.) A "workman" within the meaning of the Act.

(iii.) A member of the crew of any ship registered in the United Kingdom, or of any other British ship or vessel of which the owner, or (if there is more than one owner) the managing owner, or manager resides or has his principal place of business in the United Kingdom.

The terms "master," "pilot," and "seaman" and "ship," are defined in s. 742 of the Merchant Shipping Act, 1894, and a large number of cases have been decided under that Act as to the meaning of these words. These are outside the scope of the present work. See also *Corbett v. Pearce* [3104]. For a person to come within s. 7, he must not only be a seaman within the meaning of s. 742 of the Merchant Shipping Act, 1894, *i.e.*, a "person employed or engaged in any capacity on board any ship," but he must also be "a member of the crew." Thus the word "seamen" within the meaning of s. 7 would not include painters and other persons who are employed on board to do work of a temporary character.

The provision that the ship must be registered in the United Kingdom, or that the owner, managing owner, or manager must reside or have his principal place of business in the United Kingdom,

excludes from the operation of the section all seamen who are employed on any other ship or vessel. They will still be able to claim the benefits of the Act, provided that they are "workmen" within the meaning of s. 13, and that the accident occurs within the territorial limits of the United Kingdom (*Vande Plas v. Goedhart Brothers, Ltd.* [2405]). But if proceedings are taken under s. 7, the applicant can only succeed if he shows that he comes within the section (*Panagotis v. Owners of Ship Pontiac* (No. 2) [2404]). With regard to notice of accident, and claim for compensation, see rule 38 Workmen's Compensation Rules, 1913). See also *Maginn v. Carlingford Lough Steamship Co.* [2406].

Paragraphs (d) and (e) of sub-s. 1 are inserted to prevent the overlapping of benefits under the Workmen's Compensation Act and the Merchant Shipping Act. The effect of the two Acts in regard to this point was considered in *McDermott v. S.S. Tintoretto* [2407]; *Buls v. Teutonic (Owners)* [2408]. Although s. 7 brings seamen within the Act, they will not be able to recover compensation under s. 8, where they contract an "industrial disease" (*Curtis v. Black & Co.* [2409]).

One class of seamen is excluded from the Act, for by s. 7, sub-s. 2, "this Act shall not apply to such members of the crew of a fishing vessel as are remunerated by shares in the profits or the gross earnings of the working of such vessel." A fisherman who, in addition to his weekly wage, receives poundage on the profits of the voyage (*Costello v. S.S. Pigeon (Owners)* [2410]), or who receives shares guaranteed to be equal to a fixed sum (*Admiral Fishing Co. v. Robinson* [2412]), is not within the Act, but a fisherman is not excluded merely because he owns ten of the sixty-four shares in the vessel (*Sharpe v. Carswell* [2413]; see also the Scotch cases of *Woolfe v. Colquhoun* [2414]) and *Gill v. Aberdeen Steam Trawling Co.* [2415]. A share hand cannot claim compensation in respect of an accident which happens to him while voluntarily undertaking additional employment incidental to his engagement as a share fisherman (*Whelan v. Great Northern Steam Shipping Co.* [2416]). A small boat which is used for carrying fish from ships to the shore is not a "fishing vessel" within the section (*Clark v. Jamieson* [2417]).

The cases are grouped as follows :—

I. General Principles.

II. Crew of Fishing Vessel Remunerated by Shares.

I. General Principles.

2404.—Panagotis v. Owners of Ship Pontiac (No. 2), (1912); 5 B. W. C. C. 147—C. A.

A foreign seaman on a foreign ship in an English port met with an accident. He obtained in the county court an order for detention of the ship under s. 11, and also obtained an award of compensation against the owners of the ship, proceeding against them and serving the master of the ship as provided by s. 7 of the Workmen's Compensation Act, 1906, but claiming to be entitled to compensation, not under s. 7, but as a workman apart from that section. On appeal:

HELD—that, as the proceedings were brought in manner only allowed by s. 7, the workman could only succeed if he came within s. 7, which he did not, as the ship was not a British ship.

2405.—Van de Plas v. Goedhart Brothers, Ltd. (1910), 128 L. T. J. 203—County Court.

A foreigner employed on a foreign mud barge owned by a foreign company, working in a tidal river in the United Kingdom, is not within s. 7 of the Workmen's Compensation Act, 1906, but he is entitled to claim as a workman under the other sections of the Act, if injured by accident arising out of and in the course of his employment, and, if he is killed by such accident, his dependants are entitled so to claim though they may be foreign subjects resident abroad.

He is a "seaman" within the definition of the Act, being employed "in some capacity" on a ship or vessel.

2406.—Maginn v. Carlingford Lough Steamship Co., Ltd. (1909), 43 Ir. L. T. 123; 2 B. W. C. C. 224—C. A. (Ir.)

On a claim for compensation under s. 7 of the Workmen's Compensation Act, 1906, in respect of the death of a seaman, the proceedings are regulated by the provisions of the Workmen's Compensation Acts and not by the provisions applicable to the recovery of wages under s. 174, sub-ss. 2, 3, of the Merchant Shipping Act, 1894, which latter provisions are incorporated in the Act of 1906, for the purpose of facilitating seamen in making their claims.

The lapse of twelve months during which a ship has not been heard of (after which, under s. 174 of the Merchant Shipping Act, 1894, she is deemed to have been lost with all hands) is not a condition precedent to a claim for compensation under the Workmen's Compensation Act.

Accordingly, where by the ordinary rules of evidence, a seaman would be deemed to have been lost at sea with his ship, an application for compensation may be made, notwithstanding that twelve months have not elapsed from the time when the ship was last heard of.

2407.—McDermott v. S.S. Tintoretto (Owners), [1911] A. C. 35 ; 80 L. J. K. B. 161 ; 103 L. T. 769 ; 27 T. L. R. 149 ; 55 S. J. 124 ; 11 Asp. M. C. 515 ; 4 B. W. C. C. 123 ; 48 Sc. L. R. 728—H. L.

Wages paid to a seaman between the date of an accident and his discharge by the shipowners do not come within the words “ payment, allowance or benefit ” in Schedule I. (3) of the Workmen’s Compensation Act, 1906.

HELD, therefore—that the county court judge was right in declining to have regard to eight days’ wages paid to a seaman between the happening of the accident and his discharge, as the words “ during the period of his incapacity ” mean the period during which the shipowner is liable to pay compensation under the Act, and which begins when the seaman ceases to be entitled to maintenance under the Merchant Shipping Acts.

Notes.—Decision of C. A., [1909] 2 K. B. 704 ; 78 L. J. K. B. 1144 ; 101 L. T. 90 ; 25 T. L. R. 691 ; 53 S. J. 650 ; 2 B. W. C. C. 208, reversed.

In his judgment, Lord Loreburn, L.C., said : “ When a seaman meets with an accident at sea which disables him, he must be paid his wages till he reaches a port where he can be discharged. Further, if he is discharged at a foreign port, the owners must maintain him and furnish him with medical aid till he is able to travel and reaches a port in this country. That is under the Merchant Shipping Acts. Then the Workmen’s Compensation Act, 1906, takes up the tale. Before 1906, the seaman was not within the Act. In 1906 the right to compensation for accidental injury was extended to seamen, and begins when the injured seaman ceases to be entitled to maintenance. It is clear that compensation is to begin exactly where the right to maintenance ends. . . . It is not every payment, allowance, or benefit which the workman may receive from the employer during the period of his incapacity that the county court judge must have regard to. It is only such as are received in respect of the incapacity, and received in respect of that period of it which is covered by the compensation. It means, in short, that the man is not to be paid twice over, by the overlapping of benefits derived from two separate Acts of Parliament.”

2408.—Buls v. S.S. Teutonic (Owners), [1913] W. C. & I. Rep. 752 ; 109 L. T. 127 ; 29 T. L. R. 675 ; 6 B. W. C. C. 653—C. A.

A fireman on board a steamship was injured in the course of his employment, but the accident did not disable him at the time, and he continued working till the end of the voyage. Afterwards, as the result of the injury, he had to go into hospital and was incapacitated from work for some time. On a claim by him for compensation, the employers contended that the statutory release signed by the applicant at the end of the voyage under s. 136 of the Merchant Shipping Act, 1894, was a bar to his claim.

HELD—that the statutory release only operated with reference to

the rights arising out of the particular contract with the fireman *qua* seaman, and did not operate as a bar to a claim under the Workmen's Compensation Act, 1906.

2409.—*Curtis v. Black & Co.*, [1909] 2 K. B. 529 ; 78 L. J. K. B. 1022 ; 25 T. L. R. 621—C. A.

A seaman contracted lead poisoning whilst painting the hold of a ship during the course of the voyage. He was discharged at New York, and after returning home he obtained a certificate of disablement from the certifying surgeon for the Liverpool district under the Factory and Workshop Act, 1901.

HELD—that under s. 8, sub-s. 1, par. 1 of the Workmen's Compensation Act, 1906, before the applicant could make any claim for compensation in respect of an industrial disease he must get a certificate from the certifying surgeon appointed under the Factory and Workshop Act, 1901, for the district in which he was employed ; and that, as there was no district in which he was employed at the time when he contracted the disease, he could not successfully make a claim.

Notes.—Buckley, L.J., in his judgment said : “ It may be that par. (iii.), which is confined to cases in which death has taken place, must fall within the same category ; but it does not apply to this applicant, for he is still alive. It is not necessary, therefore, to decide that in the present case.”

II. *Crew of Fishing Vessel Remunerated by Shares.*

2410.—*Costello v. S.S. Pigeon (Owners)*, [1913] A. C. 407 ; 82 L. J. K. B. 873 ; [1913] W. C. & I. Rep. 410 ; 108 L. T. 929 ; 57 S. J. 609 ; 29 T. L. R. 595 ; 6 B. W. C. C. 480—H. L. (E.)

A man employed on a fishing vessel who receives, in addition to his food and some other small perquisites, wages at a fixed rate per week, and also poundage on the net profits of the voyage, is a member of the crew of a fishing vessel remunerated by a share in the profits of the working of such vessel within s. 7, sub-s. 2, of the Workmen's Compensation Act, 1906, and therefore the Act does not apply to him.

Notes.—In his judgment the Earl of Halsbury said : “ There are a certain number of men who are in the ordinary sense servants ; they are persons who engage for wages at a particular rate, and the Act is intended to give workmen certain rights in compensation : but it was, I should have thought, probably argued in Parliament, and it would probably be the meaning which was intended to be enacted by the language used, that for a variety of reasons a distinction ought to be drawn between what I will call the ordinary workman, and the share-holding workmen who become co-adventurers, or, as one of the Scotch judges said, partners in the concern. It is obvious, I think, that the legislature would strive to draw a distinction between persons of the former class and persons who are in the nature of employers or partners in the joint adventure, and to say that those co-adventurers should not claim the rights of the mere

workman ; and they have accordingly used the phrase that is now in debate."

2411.—Costello v. Kelsall Brothers and Beeching, Ltd. ; Canwell v. Kelsall Brothers and Beeching, Ltd ; Tindall v. Great Northern Steam Fishing Co. (1912), 5 B. W. C. C. 667 ; [1913] W. C. & I. Rep. 72—C. A.

Members of the crews of fishing vessels were remunerated by a weekly wage, food, sleeping accommodation, and poundage on the net profits of the voyage, at 3*d.* or 1*d.* in the £.

HELD—they were remunerated by shares in the profits of the working of such vessels within the meaning of s. 7, sub-s. 2, of the Act.

Notes.—The case of *Costello v. Kelsall Brothers* was affirmed in the House of Lords *sub nom. Costello v. S.S. Pigeon (Owners)* [2410].

2412.—Admiral Fishing Co. v. Robinson, [1910] 1 K. B. 540 ; 79 L. J. K. B. 551 ; 102 L. T. 203 ; 54 S. J. 305 ; 26 T. L. R. 299—C. A.

An engineer employed on a fishing steam drifter who is remunerated by a share in the profits of working the vessel and has in addition a guarantee from the owners that his share shall not be less than 30*s.* a week is within s. 7, sub-s. 2, of the Workmen's Compensation Act, 1906, and is therefore excluded from the benefit conferred on seamen by the Act, and is not entitled to compensation in respect of injury by accident arising out of and in the course of his employment.

2413.—Sharpe v. Carswell, [1910] S. C. 391 ; 47 Sc. L. R. 335 ; 3 B. W. C. C. 552—Ct. of Sess.

S., the owner of ten sixty-fourth shares of the *Dolphin*, was employed by the managing owner as master at a fixed remuneration. His total earnings for three years before his death (which occurred by accident) amounted to £234 16*s.* In a claim by his widow for compensation under the Workmen's Compensation Act, 1906, against the managing owner :

HELD—(1) that the deceased was a workman employed by the defender in the sense of the Act.

(2) That the fact that the deceased held shares in the vessel did not bar the claim.

(3) That the fact that he held these shares did not make him a partner or joint adventurer in the trading of the vessel, although ultimately he would bear part of the loss.

Notes.—*Ellis v. Joseph Ellis & Co.*, [1905] 1 K. B. 324 [2487] ; *Gorman v. Gibson*, [1910] S. C. 317 [2438], referred to.

2414.—Woolfe v. Colquhoun, [1912] S. C. 1190 ; 49 Sc. L. R. 911, [1912] W. C. 342—Ct. of Sess.

A claimant under the Workmen's Compensation Act, 1906, was employed as a member of the crew, in the capacity of a fisherman, on board a steam trawler. He was paid a weekly wage of 30*s.*, and

received in addition a payment of 2*d.* per pound sterling on the gross value of the fish landed from the trawler, under deduction of the cost of carriage of the fish. This additional payment had amounted to 7*s.* for one week.

HELD (Lord Dundas *diss.*)—that he was not “remunerated by shares in the profits or the gross earnings of the working” of the trawler, and was therefore not excluded by s. 7, sub-s. 2, of the Act from claiming compensation under the Act.

Notes.—*Admiral Fishing Co. v. Robinson* [2412] discussed and distinguished. *Whelan v. Great Northern Steam Shipping Co.* [2416]; *Clark v. Jamieson* [2417]; *Ellis v. Joseph Ellis & Co.*, [1905] 1 K. B. 324 [2487], referred to.

2415.—*Gill v. Aberdeen Steam Trawling and Fishing Co.*, [1908] S. C. 328; 45 Sc. L. R. 247; 1 B. W. C. C. 274—Ct. of Sess.

The sole remuneration of the mate or first fisherman of a steam trawler while at sea was one and one-eighth share (each share being one-fourteenth) of the net balance of the gross price of the fish caught on a trip, after deducting certain specified expenses, which did not include the wages of other members of the crew, who were paid by fixed wages.

HELD—that such remuneration was a share in the profits or the gross earnings of the vessel, and that the fisherman so paid fell under the exception contained in s. 7, sub-s. 2, of the Workmen's Compensation Act, 1906, and was consequently precluded from claiming compensation under that Act.

2416.—*Whelan v. Great Northern Steam Shipping Co.* (1909), 78 L. J. K. B. 860; 100 L. T. 913; 25 T. L. R. 619; 2 B. W. C. C. 235—C. A.

A share hand or fisherman—that is a member of the crew of a trawler who is remunerated by a share of profits or gross earnings and therefore excluded by s. 7, sub-s. 2, from the benefit of the Workmen's Compensation Act, 1906—cannot claim compensation under the Act in respect of an accident which happened to him while voluntarily employed at an extra remuneration (which was shared between himself and the other members of the trawler's crew) in stowing fish boxes on another vessel belonging to the same employers, which carried the day's catch to market, such additional employment arising out of and being incidental to his engagement as a share fisherman.

Notes.—*Per* Cozens-Hardy, M.R.: “The position of a share fisherman is that of a co-adventurer, interested in the totality of the venture and not merely in one part of it. The conveying the fish from the trawler to the cutter and stowing the fish in the cutter is essential to the success of the venture. . . . This casual employment arose out of and was really part of his employment as a share fisherman. . . . In truth, there was only one contract of employment, and this stowing was a matter arising out of and incidental to the engagement as a share fisherman.”

2417.—*Clark v. Jamieson*, [1909] S. C. 132; 46 Sc. L. R. 73—Ct. of Sess.

A flitboat, which is a small sailing boat worked by a skipper and one hand, and which is used for the purpose of conveying fish between curing stations and vessels lying off shore, is not a “fishing vessel” within the meaning of s. 7, sub-s. 2, of the Workmen’s Compensation Act, 1906. Thus a member of the crew of such a vessel, who was remunerated by a share of the gross earnings of the vessel, is a “workman” within the meaning of the Workmen’s Compensation Act, 1906, and not a partner in a joint adventure.

Notes.—*Cox v. Hickman* (1860), 8 H. L. C. 268, referred to.

INDUSTRIAL DISEASES.

Sect. 8.—(1) Where—

- (i.) the certifying surgeon appointed under the Factory and Workshop Act, 1901, for the district in which a workman is employed certifies that the workman is suffering from a disease mentioned in the Third Schedule to this Act and is thereby disabled from earning full wages at the work at which he was employed ; or
 - (ii.) a workman is, in pursuance of any special rules or regulations made under the Factory and Workshop Act, 1901, suspended from his usual employment on account of having contracted any such disease ; or
 - (iii.) the death of a workman is caused by any such disease ;
- and the disease is due to the nature of any employment in which the workman was employed at any time within the twelve months previous to the date of the disablement or suspension, whether under one or more employers, he or his dependants shall be entitled to compensation under this Act as if the disease or such suspension as aforesaid were a personal injury by accident arising out of and in the course of that employment, subject to the following modifications :—
- (a) The disablement or suspension shall be treated as the happening of the accident ;
 - (b) If it is proved that the workman has at the time of entering the employment wilfully and falsely represented himself in writing as not having previously suffered from the disease, compensation shall not be payable ;
 - (c) The compensation shall be recoverable from the employer who last employed the workman during the said twelve months in the employment to the nature of which the disease was due :

Provided that—

(i.) the workman or his dependants if so required shall furnish that employer with such information as to the names and addresses of all the other employers who employed him in the employment during the said twelve months as he or they may possess, and, if such information is not furnished, or is not sufficient to enable that employer to take proceedings under the next following proviso, that employer upon proving that the disease was not contracted whilst the workman was in his employment shall not be liable to pay compensation ; and

(ii.) if that employer alleges that the disease was in fact contracted whilst the workman was in the employ-

ment of some other employer, and not whilst in his employment, he may join such other employer as a party to the arbitration, and if the allegation is proved that other employer shall be the employer from whom the compensation is to be recoverable ; and

(iii.) if the disease is of such a nature as to be contracted by a gradual process, any other employers, who during the said twelve months employed the workman in the employment to the nature of which the disease was due, shall be liable to make to the employer from whom compensation is recoverable such contributions as, in default of agreement, may be determined in the arbitration under this Act for settling the amount of the compensation ;

- (d) The amount of the compensation shall be calculated with reference to the earnings of the workman under the employer from whom the compensation is recoverable ;
- (e) The employer to whom notice of the death, disablement, or suspension is to be given shall be the employer who last employed the workman during the said twelve months in the employment to the nature of which the disease was due, and the notice may be given notwithstanding that the workman has voluntarily left his employment ;
- (f) If an employer or a workman is aggrieved by the action of a certifying or other surgeon in giving or refusing to give a certificate of disablement or in suspending or refusing to suspend a workman for the purposes of this section, the matter shall in accordance with regulations made by the Secretary of State be referred to a medical referee, whose decision shall be final.

(2) If the workman at or immediately before the date of the disablement or suspension was employed in any process mentioned in the second column of the Third Schedule to this Act, and the disease contracted is the disease in the first column of that Schedule set opposite the description of the process, the disease, except where the certifying surgeon certifies that in his opinion the disease was not due to the nature of the employment, shall be deemed to have been due to the nature of that employment, unless the employer proves the contrary.

(3) The Secretary of State may make rules regulating the duties and fees of certifying and other surgeons (including dentists) under this section.

(4) For the purposes of this section the date of disablement shall be such date as the certifying surgeon certifies as the date on which the disablement commenced, or, if he is unable to certify such a date, the date on which the certificate is given :

Provided that—

- (a) Where the medical referee allows an appeal against a refusal by a certifying surgeon to give a certificate of disablement, the date of disablement shall be such date as the medical referee may determine :

- (b) Where a workman dies without having obtained a certificate of disablement, or is at the time of death not in receipt of a weekly payment on account of disablement, it shall be the date of death.

(5) In such cases, and subject to such conditions as the Secretary of State may direct, a medical practitioner appointed by the Secretary of State for the purpose shall have the powers and duties of a certifying surgeon under this section, and this section shall be construed accordingly.

(6) The Secretary of State may make orders for extending the provisions of this section to other diseases and other processes, and to injuries due to the nature of any employment specified in the order not being injuries by accident, either without modification or subject to such modifications as may be contained in the order.

(7) Where, after inquiry held on the application of any employers or workmen engaged in any industry to which this section applies, it appears that a mutual trade insurance company or society for insuring against the risks under this section has been established for the industry, and that a majority of the employers engaged in that industry are insured against such risks in the company or society and that the company or society consents, the Secretary of State may, by Provisional Order, require all employers in that industry to insure in the company or society upon such terms and under such conditions and subject to such exceptions as may be set forth in the Order. Where such a company or society has been established, but is confined to employers in any particular locality or of any particular class, the Secretary of State may for the purposes of this provision treat the industry, as carried on by employers in that locality or of that class, as a separate industry.

(8) A Provisional Order made under this section shall be of no force whatever unless and until it is confirmed by Parliament, and if, while the Bill confirming any such Order is pending in either House of Parliament, a petition is presented against the Order, the Bill may be referred to a Select Committee, and the petitioner shall be allowed to appear and oppose as in the case of Private Bills, and any Act confirming any Provisional Order under this section may be repealed, altered, or amended by a Provisional Order made and confirmed in like manner.

(9) Any expenses incurred by the Secretary of State in respect of any such Order, Provisional Order, or confirming Bill shall be defrayed out of moneys provided by Parliament.

(10) Nothing in this section shall affect the rights of a workman to recover compensation in respect of a disease to which this section does not apply, if the disease is a personal injury by accident within the meaning of this Act.

Industrial Diseases.

The effect of this section is to rank certain diseases, if caused in certain ways, as accidents for the purpose of the Act.

These diseases are :—

(1) As provided by the Third Schedule of the Act of 1906 :

<i>Description of Disease.</i>	<i>Description of Process.</i>
Anthrax	Handling of wool, hair, bristles, hides, and skins.
Lead poisoning or its sequelæ .	Any process involving the use of lead or its preparations or compounds.
Mercury poisoning or its sequelæ	Any process involving the use of mercury or its preparations or compounds.
Phosphorus poisoning or its sequelæ.	Any process involving the use of phosphorus or its preparations or compounds.
Arsenic poisoning or its sequelæ .	Any process involving the use of arsenic or its preparations or compounds.
Ankylostomiasis	Mining.

(2) As provided by Orders dated May 22nd, 1907 ; as amended by Order dated December 2nd, 1908 :

<i>Description of Disease.</i>	<i>Description of Process.</i>
1. Poisoning by nitro- and amido-derivatives of benzene (dinitro-benzol, anilin, and others), or its sequelæ.	Any process involving the use of a nitro- or amido-derivative of benzene or its preparations or compounds.
2. Poisoning by carbon bisulphide or its sequelæ.	Any process involving the use of carbon bisulphide or its preparations or compounds.
3. Poisoning by nitrous fumes or its sequelæ.	Any process in which nitrous fumes are evolved.
4. Poisoning by nickel carbonyl or its sequelæ.	Any process in which nickel carbonyl gas is evolved.
5. Arsenic poisoning or its sequelæ .	Handling of arsenic or its preparations or compounds.
6. Lead poisoning or its sequelæ .	Handling of lead or its preparations or compounds.
7. Poisoning by <i>Gonioma Kamassi</i> (African boxwood) or its sequelæ.	Any process in the manufacture of articles from <i>Gonioma Kamassi</i> (African boxwood).
8. Chrome ulceration or its sequelæ	Any process involving the use of chromic acid or bi-chromate of ammonium, potassium, or sodium, or their preparations.
9. Eczematous ulceration of the skin produced by dust or liquids, or ulceration of the mucous membrane of the nose or mouth produced by dust.	—
10. Epitheliomatous cancer or ulceration of the skin or of the corneal surface of the eye, due to pitch, tar, or tarry compounds.	Handling or use of pitch, tar, or tarry compounds.
11. Scrotal epithelioma (chimney-sweeps' cancer).	Chimney-sweeping.
12. Nystagmus	Mining.
13. Glanders.	Care of any equine animal suffering from glanders ; handling the carcass of such animal.
14. Compressed air illness or its sequelæ.	Any process carried on in compressed air.
15. Subcutaneous cellulitis of the hand (beat hand).	Mining.

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| 16. Subcutaneous cellulitis over the patella (miners' beat knee). | Mining. |
| 17. Acute bursitis over the elbow (miners' beat elbow). | Mining. |
| 18. Inflammation of the synovial lining of the wrist joint and tendon sheaths. | Mining. |
| 19. Cataract in glass-workers.
(The order provides that a glass-worker suffering from cataract shall be entitled to compensation for a period of not longer than six months in all, nor for more than four months unless he has undergone an operation for cataract.) | Process in the manufacture of glass involving exposure to the glare of molten glass. |
| 20. Telegraphist's cramp.
(The order provides that in the application of section 8 to telegraphist's cramp, in case of workmen employed by the Postmaster-General, the Post Office Medical Officer under whose charge the workman is placed shall be substituted for the certifying surgeon if so authorised to act by the Postmaster-General.) | Use of telegraphic instruments. |

For procedure, see Workmen's Compensation Rules, 1913, rule 41.

2418.—Haylett v. Vigor, [1908] 2 K. B. 837 ; 77 L. J. K. B. 1132 ; 99 L. T. 674 ; 24 T. L. R. 885—C. A.

A workman, employed as a painter, in September, 1907, showed signs of “plumbism,” and was removed to hospital on the 25th of that month, but all traces of the disease had before that date disappeared. He died on October 2nd, 1907. His dependants claimed compensation under s. 8 of the Workmen’s Compensation Act, 1906. The county court judge found that the immediate cause of death was granular kidney ; that that disease was a sequela of lead poisoning, as also of gout, alcoholism, and other complaints ; and that lead poisoning was not proved to have been the cause of death ; but that, on the other hand, the employers did not prove that it was not the cause of death ; and he awarded compensation.

HELD (reversing the decision of the county court judge)—that, in order to bring the case within the operation of s. 8, sub-s. 1, it must be established that lead poisoning was either the proximate or ultimate cause of death ; that it was not sufficient that death was caused by something which might in some cases be a sequela of lead poisoning, but might also be a sequela of gout or alcoholism ; that it must be proved that death was at least a remote consequence in the case of the particular individual ; and that sub-s. 2 of s. 8 presupposed death caused by a disease mentioned in the Third Schedule, and dealt only with evidence, and had no effect until the applicant had brought the case within sub-s. 1.

Notes.—This was the first case in which s. 8, sub-ss. 1 and 2, was considered by the Court of Appeal. It was argued that sub-s. 2 enlarges the scope of the section, and throws upon the employer the burden of proof. This contention was dealt with by Farwell, L.J., as follows : “ Sub-s. 2 has no application to a case like the present ; it only comes into operation when lead poisoning or a disease consequent upon lead poisoning has been proved ; and it then raises an inference in favour of the claimant that, lead poisoning, as either the immediate or ultimate cause of death, being proved, such disease was caused by employment in work where lead was handled, an inference which is reasonable enough if death is proved to have been due to lead poisoning directly, or as the *causa causans*, but quite unreasonable if death may more probably or as probably have resulted from gout or alcohol, and no evidence of lead poisoning at all has been given.”

2419.—Greenhill v. “The Daily Record,” Glasgow, Ltd., (1909) 46 Sc. L. R. 483 ; 2 B. W. C. C. 244—Ct. of Sess.

A stereotyper in the employment of a newspaper showed, early in 1907, symptoms of lead poisoning. He finally left the employment on June 22nd, 1907, and eventually died on September 14th, 1907.

HELD—that the provisions of the Workmen’s Compensation Act, 1906, were not applicable, since the deceased was not on July 1st, 1907, the date of the commencement of the Act, in the employment

of the respondents, or of any one else, and that accordingly his widow was not entitled to compensation.

2420.—Taylor v. Burnham (No. 2), [1910] S. C. 705; 47 Sc. L. R. 643—Ct. of Sess.

A workman claiming compensation for lead poisoning produced in the arbitration proceedings a correct list of names and addresses of other employers, as required by s. 8, sub-s. 1 (c) (i.), of the Workmen's Compensation Act, 1906, but he falsely added a statement that he did not use white lead when employed by them.

HELD—that the mere fact that he had made this false statement did not bar the workman from obtaining compensation, the last employers not having in fact been prejudiced thereby.

Notes.—This case is also mentioned on another point [2475].

2421.—Jones v. New Brynmally Colliery Co., Ltd. (1912), 106 L. T. 524; 5 B. W. C. C. 375; [1912] W. C. Rep. 281—C. A.

Where there was no evidence that miners' nystagmus—an "industrial disease" within the meaning of s. 8 of the Workmen's Compensation Act, 1906—from which a collier had been suffering, due to the nature of the employment in which he had been employed, but from which he had entirely recovered, rendered him more liable to the danger of a recurrence of that disease rather than that he possessed a physical susceptibility to the disease not common to all colliers :

HELD—that there was not sufficient evidence to support an award for compensation under s. 1 of the Act, because his employers would not permit him to work for them underground again.

Notes.—*Thomas v. Fairbain, Lawson & Co.*, 4 B. W. C. C. 199 [2714], referred to.

2422.—Garnant Anthracite Collieries, Ltd. v. Rees, [1912] 3 K. B. 372; 81 L. J. K. B. 1189; 107 L. T. 279; 5 B. W. C. C. 694; [1912] W. C. Rep. 396—C. A.

On application by employers for a review of a weekly payment under the Workmen's Compensation Act, 1906, it appeared that the compensation had been awarded in respect of an industrial disease, and the county court judge held that, although the applicant was no longer suffering from the disease, he was unable to do his former work because of his increased susceptibility to the disease owing to his first attack, and that he was therefore still entitled to compensation.

HELD (on this finding)—that the effects of the accident, that is of the industrial disease, still continued to exist, and the applicant was entitled to compensation.

Notes.—*Jones v. New Brynmally Colliery Co., Ltd.* [2421] followed.

2423.—Darroll v. Glasgow Iron and Steel Co., [1913] S. C. 387 ; [1913] W. C. & I. Rep. 80 ; 50 Sc. L. R. 226 ; 6 B. W. C. C. 354—Ct. of Sess.

In an application by employers for the ending or diminishing of a weekly payment it was proved that the workman, after being duly certified as suffering from miner's nystagmus (an industrial disease), was awarded compensation, that he had "now completely recovered from this attack," but that he was susceptible to a recurrence of the disease. It was not proved whether the susceptibility was due to the original attack or to constitutional predisposition, the evidence being inconclusive.

HELD—that as the workman had recovered from the original attack, and as he had failed to discharge the *onus* which lay on him of proving that his susceptibility to recurrence of the disease was due to that attack, the compensation fell to be ended.

Notes.—In his judgment the Lord Justice Clerk said : "The whole matter turns on what is to be proved and who is to prove it. A tendency to a recurrence of evil may be incapacity under the Act, but unless the workman can prove that such tendency is connected with the original evil condition produced by the accident—as in this case by the attack of nystagmus—the employer cannot be called on to pay any further compensation." *M'Ghee v. Summerlee Iron Co.*, [1911] S. C. 870 [2763] ; *Jones v. New Brynmally Colliery Co., Ltd.* [2421], applied. *Duris v. Wilsons and Clyde Coal Co.*, [1912] S. C. (H. L.) 74 [2770], distinguished. *Garnant Anthracite Collieries, Ltd. v. Rees* [2422] ; *M'Callum v. Quinn*, [1909] S. C. 227 [2818], referred to.

2424.—Mallinder v. J. Moores & Sons, Ltd., [1912] 2 K. B. 124 ; 81 L. J. K. B. 714 ; 106 L. T. 487 ; 5 B. W. C. C. 362 ; [1912] W. C. Rep. 257—C. A.

The claimant, a workman in the employment of the defendants, applied to the county court judge to settle the compensation to which he was entitled under the Workmen's Compensation Act, 1906, in respect of mercurial poisoning alleged to have been contracted by him whilst in the service of the defendants. The defendants disputed their liability and also served a third party notice for contribution under s. 8, sub-s. 1 (c) (iii.), on previous employers of the claimant by whom he had been employed within the twelve months previous to the date of his disablement. The judge awarded compensation and dismissed the third party notice on the ground that the defendants had failed to prove that the claimant's disease was in fact contracted whilst he was in the service of the previous employers.

HELD—that this was an application for contribution under s. 8, sub-s. 1 (c) (iii.), not an application under s. 8, sub-s. 1 (c) (ii.), to join another employer as defendant, and that there was no obligation on the appellants to prove that the disease was contracted whilst the claimant was in the service of the previous employers.

2425.—*Lees v. Waring and Gillow, Ltd., Ferguson Third Party* (1909), 127 L. T. J. 495; 2 B. W. C. C. 474—Decision of His Honour Judge Parry.

HELD—where an industrial disease is contracted by a gradual process, and, during the twelve months previous to the incapacity, the workman had been employed by two employers, in the absence of any special risk or degree of the poison in either of the employments, the basis for calculating the proportion of the compensation which should be paid by each employer is the period during which the workman was employed by each.

2426.—*Winters v. Addie & Sons' Collieries, Ltd.*, [1911] S. C. 1174; 48 Sc. L. R. 940; 5 B. W. C. C. 511—Ct. of Sess.

Where a certificate by a certifying surgeon as to whether a workman is suffering from an industrial disease is objected to, and is referred to under s. 8, sub-s. 1 (iii.) (*f*), of the Workmen's Compensation Act, 1906, to a medical referee, it is the duty of the medical referee to decide categorically whether the certificate has been rightly granted or not.

Where, therefore, a medical referee had pronounced a decision "subject to" a note, the terms of the note being contradictory of what purported to be the effect of the decision:

HELD—that the matter must be remitted to him to complete the reference by giving a categorical answer.

Notes.—*Garrett v. Waddell & Son* [2427] referred to.

2427.—*Garrett v. Waddell & Son*, [1911] S. C. 1168; 48 Sc. L. R. 937; 5 B. W. C. C. 507—Ct. of Sess.

Under s. 8, sub-s. 1 (*f*), of the Workmen's Compensation Act, 1906, a medical referee can only decide whether a certifying surgeon's certificate was rightly granted; and accordingly, where a medical referee had upheld the granting of a certificate of disablement, and addendum by him to the effect that, at the date of his (the medical referee's) examination, the workman is again able for his work, is incompetent, and must be treated *pro non scripto*.

Notes.—*Winters v. Addie & Sons' Collieries, Ltd.* [2426] referred to.

2428.—*McGinn v. Udston Coal Co., Ltd.*, [1912] S. C. 668; 49 Sc. L. R. 531; 5 B. W. C. C. 559; [1912] W. C. Rep. 134—Ct. of Sess.

Where a workman is employed in a process mentioned in the second column of the Third Schedule to the Workmen's Compensation Act, 1906, and obtains from the certifying surgeon (or, on appeal, from the medical referee) a certificate that he is suffering from a disease mentioned in the first column of that schedule set opposite the description of the process, but the certifying surgeon (or medical referee) certifies that in his opinion the disease is not due to the nature of the employment, then, while the statutory presumption of s. 8, sub-s. 2, that the disease is due to the nature of the employment, is thereby excluded,

yet on the other hand the workman is not foreclosed from proving in terms of s. 8, sub-s. 1, that the disease was due to the nature of the employment.

Notes.—*Winters v. Addie & Sons' Collieries, Ltd.* [2426] referred to.

2429.—*Jones v. Ebbw Vale Steel, Iron, and Coal Co., Ltd.* (1910), 3 B. W. C. C. 181—C. A.

Observations on Form 15 in the Schedule to the Regulations, dated June 21st, 1907, made by the Secretary of State and the Treasury under s. 8 of the Act, which only provides for the medical referee “allowing” or “dismissing” an appeal.

2430.—*Birks v. Stafford Coal and Iron Co., Ltd.*, [1913] 3 K. B. 686; [1913] W. C. & I. Rep. 755; 57 S. J. 729; 6 B. W. C. C. 617—C. A.

Where a certifying surgeon, under s. 8 of the Workmen's Compensation Act, 1906, gives a workman suffering from an industrial disease a certificate to that effect, but does not fix the date of disablement, or fixes it at a time which is later than that claimed by the workman, or otherwise does not give the certificate asked for, the workman has a right of appeal to a medical referee, as from a refusal to give such certificate, and the medical referee has jurisdiction to fix the date of disablement, or to alter the date fixed by the certificate.

Notes.—*Per Kennedy, L.J.*: “There was an aggrieving of the workman—a grievance suffered by the workman in getting a certificate which was not that which he had asked for, and there was an aggrieving of the workman in the refusal of the surgeon to give the certificate for which the workman did ask. I think there is no difficulty, therefore, really in giving a fair construction to this rather complicated piece of legislation by saying that in the present case there was within the fair meaning of the construction of this section in fact a refusal to give a certificate such as the workman asked for, and it was a refusal which was, therefore, the subject of appeal, and upon appeal the medical referee was entitled to do what he did, which was to deal with the date of the disablement.”

Per Cozens-Hardy, M.R.: “If the workman be treated as ‘aggrieved’ by the surgeon's refusing to give him a proper certificate within the meaning of the Act, I may perhaps assent, though it may only be a dictum, to the observation of the Lord President in *M'Ginn v. Udston Coal Co.* [2428], who said that the medical referee may do anything that the certifying surgeon could have done.” *Moore v. Naval Colliery, Co.* [2303] referred to.

2431.—*Taylor v. Burnham* (No. 1), [1909] S. C. 704; 46 Sc. L. R. 482; 2 B. W. C. C. 247—Ct. of Sess.

In proceedings by a workman for recovery of compensation under the Workmen's Compensation Act, 1906, on the ground that he is

suffering from an industrial disease, the certificate of a certifying surgeon that he is so suffering does not require to be obtained before the initiation of proceedings, but may be obtained and produced in the course of the proceedings.

See also *Curtis v. Black & Co.*, [1909] 2 K. B. 529 [2409], and *Moore v. Naval Colliery Co.* [1912] 1 K. B. 28 [2303].

2432.—*Devine v. Metcalfe* (1911), 45 Ir. L. T. 271—Recorder of Dublin.

The notice required by the Workmen's Compensation Act, 1906, in the case of a workman alleged to be suffering from industrial disease may be given to the employer before the workman has been examined, and a certificate given by the certifying surgeon, or subsequent to such examination if it does take place.

APPLICATION TO WORKMEN IN EMPLOYMENT OF CROWN.

Sect. 9.—(1) This Act shall not apply to persons in the naval or military service of the Crown, but otherwise shall apply to workmen employed by or under the Crown to whom this Act would apply if the employer were a private person :

Provided that in the case of a person employed in the private service of the Crown, the head of that department of the Royal Household in which he was employed at the time of the accident shall be deemed to be his employer.

(2) The Treasury may, by warrant laid before Parliament, modify for the purposes of this Act their warrant made under section one of the Superannuation Act, 1887, and notwithstanding anything in that Act, or any such warrant, may frame schemes with a view to their being certified by the Registrar of Friendly Societies under this Act.

2433.—**Owners of S.S. Raphael v. Brandy**, [1911] A. C. 413 ; 80 L. J. K. B. 1067 ; 105 L. T. 116 ; 27 T. L. R. 497 ; 55 S. J. 579 ; 4 B. W. C. C. 307—H. L.

The applicant was a stoker on a merchant vessel, and was also enrolled in the Royal Naval Reserve as a stoker, in respect of which latter appointment he was entitled to a retainer of £6 a year. He was injured by accident in the course of his employment on the merchant vessel, and his injuries were such as to disable him from continuing to serve in the Royal Naval Reserve. In a claim for compensation against the shipowners under the Workmen's Compensation Act, 1906 :

HELD—that in computing the applicant's average weekly earnings the amount he received as a stoker in the Royal Naval Reserve should be added to his earnings from the shipowners, as being earnings under a concurrent contract of service.

[N.B.—As to procedure in cases where the Crown is a party, see rule 95 of the Workmen's Compensation Rules, 1913.]

APPOINTMENT AND REMUNERATION OF MEDICAL REFEREES AND ARBITRATORS.

Sect. 10.—(1) The Secretary of State may appoint such legally qualified medical practitioners to be medical referees for the purposes of this Act as he may, with the sanction of the Treasury, determine, and the remuneration of, and other expenses incurred by, medical referees under this Act shall, subject to regulations made by the Treasury, be paid out of moneys provided by Parliament.

Where a medical referee has been employed as a medical practitioner in connection with any case by or on behalf of an employer or workman or by any insurers interested, he shall not act as medical referee in that case.

(2) The remuneration of an arbitrator appointed by a judge of county courts under the Second Schedule to this Act shall be paid out of moneys provided by Parliament in accordance with regulations made by the Treasury.

[Regulations, dated June 24th, 1907, have been made by the Secretary of State and the Treasury as to the duties and remuneration of medical referees in England and Wales under the provisions of the First and Second Schedules to the Workmen's Compensation Act, 1906].

DETENTION OF SHIPS.

Sect. 11.—(1) If it is alleged that the owners of any ship are liable as such owners to pay compensation under this Act, and at any time that ship is found in any port or river of England or Ireland, or within three miles of the coast thereof, a judge of any court of record in England or Ireland may, upon its being shown to him by any person applying in accordance with the rules of the court that the owners are probably liable as such to pay such compensation, and that none of the owners reside in the United Kingdom, issue an order directed to any officer of customs or other officer named by the judge requiring him to detain the ship until such time as the owners, agent, master, or consignee thereof have paid such compensation, or have given security, to be approved by the judge, to abide the event of any proceedings that may be instituted to recover such compensation and to pay such compensation and costs as may be awarded thereon ; and any officer of customs or other officer to whom the order is directed shall detain the ship accordingly.

(2) In any legal proceeding to recover such compensation, the person giving security shall be made defendant, and the production of the order of the judge, made in relation to the security, shall be conclusive evidence of the liability of the defendant to the proceeding.

(3) Section six hundred and ninety-two of the Merchant Shipping Act, 1894, shall apply to the detention of a ship under this Act as it applies to the detention of a ship under that Act, and, if the owner of a ship is a corporation, it shall for the purposes of this section be deemed to reside in the United Kingdom if it has an office in the United Kingdom at which service of writs can be effected.

This section and rules 39 and 40 of the Workmen's Compensation Rules, 1913, give to workmen and employers the same means of enforcing their claims against a shipowner who is not resident in the United Kingdom, as they have under the Shipowners' Negligence (Remedies) Act, 1905 (5 Edw. 7, c. 10).

Sect. 692 of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), provides :—

(1) Where under this Act a ship is to be or may be detained, any commissioned officer on full pay in the naval or military service of Her Majesty, or any officer of the Board of Trade, or any officer of customs, or any British consular officer may detain the ship, and if the ship after detention or after service on the master of any notice of or order for detention proceeds to sea before it is released by competent authority, the master of the ship, and also the owner and any person who sends the ship to sea, if that owner or person is party or privy to the offence, shall be liable for each offence to a fine not exceeding £100.

(2) Where a ship so proceeding to sea takes to sea when on board

thereof in the execution of his duty any officer authorised to detain the ship, or any surveyor or officer of the Board of Trade, or any officer of customs, the owner and master of the ship shall each be liable to pay all expenses of and incidental to the officer or surveyor being so taken to sea, and also to a fine not exceeding £100, or, if the offence is not prosecuted in a summary manner, not exceeding £10 for every day until the officer or surveyor returns, or until such time as would enable him after leaving the ship to return to the port from which he is taken, and the expenses ordered to be paid may be recovered in like manner as the fine.

(3) Where under this Act a ship is to be detained, an officer of customs shall, and where under this Act a ship may be detained, an officer of customs may, refuse to clear that ship outwards or to grant a transire to that ship.

(4) Where any provision of this Act provides that a ship may be detained until any document is produced to the proper officer of customs, the proper officer shall mean, unless the context otherwise requires, the officer able to grant a clearance or transire to such ship.

2434.—Panagotis v. Owners of S.S. Pontiac (No. 1), [1912] 1 K. B. 74; 81 L. J. K. B. 286; 105 L. T. R. 689; 28 T. L. R. 63; 5 B. W. C. C. 147; [1912] W. C. Rep. 74—C. A.

An order for the detention of a ship, made by a county court judge under s. 11 of the Workmen's Compensation Act, 1906, is made by him not as arbitrator, having jurisdiction in all matters arising in an arbitration under the Act, but in the exercise of his general jurisdiction as a county court judge; and an appeal from such an order lies, not to the Court of Appeal but to the Divisional Court.

RETURNS AS TO COMPENSATION.

Sect. 12.—(1) Every employer in any industry to which the Secretary of State may direct that this section shall apply shall, on or before such day in every year as the Secretary of State may direct, send to the Secretary of State a correct return specifying the number of injuries in respect of which compensation has been paid by him under this Act during the previous year, and the amount of such compensation, together with such other particulars as to the compensation as the Secretary of State may direct, and in default of complying with this section shall be liable on conviction under the Summary Jurisdiction Acts to a fine not exceeding five pounds.

(2) Any regulations made by the Secretary of State containing such directions as aforesaid shall be laid before both Houses of Parliament as soon as may be after they are made.

[Regulations dated January 15th, 1908, have been issued. No cases reported on this section.]

DEFINITIONS.

Sect. 13.—In this Act, unless the context otherwise requires,—

“Employer” includes any body of persons corporate or unincorporate and the legal personal representative of a deceased employer, and, where the services of a workman are temporarily lent or let on hire to another person by the person with whom the workman has entered into a contract of service or apprenticeship, the latter shall, for the purposes of this Act, be deemed to continue to be the employer of the workman whilst he is working for that other person ;

“Workman” does not include any person employed otherwise than by way of manual labour whose remuneration exceeds two hundred and fifty pounds a year, or a person whose employment is of a casual nature and who is employed otherwise than for the purposes of the employer’s trade or business, or a member of a police force, or an outworker, or a member of the employer’s family dwelling in his house, but, save as aforesaid, means any person who has entered into or works under a contract of service or apprenticeship with an employer, whether by way of manual labour, clerical work, or otherwise, and whether the contract is expressed or implied, is oral or in writing ;

Any reference to a workman who has been injured shall, where the workman is dead, include a reference to his legal personal representative or to his dependants or other person to whom or for whose benefit compensation is payable ;

“Dependants” means such of the members of the workman’s family as were wholly or in part dependent upon the earnings of the workman at the time of his death, or would but for the incapacity due to the accident have been so dependent, and where the workman, being the parent or grandparent of an illegitimate child, leaves such a child so dependent upon his earnings, or, being an illegitimate child, leaves a parent or grandparent so dependent upon his earnings, shall include such an illegitimate child and parent or grandparent respectively ;

“Member of a family” means wife or husband, father, mother, grandfather, grandmother, step-father, stepmother, son, daughter, grandson, granddaughter, stepson, step-daughter, brother, sister, half-brother, half-sister ;

“Ship,” “vessel,” “seaman,” and “port” have the same meanings as in the Merchant Shipping Act, 1894 ;

“Manager,” in relation to a ship, means the ship’s husband or other person to whom the management of the ship is entrusted by or on behalf of the owner ;

“Police force” means a police force to which the Police Act, 1890, or the Police (Scotland) Act, 1890, applies, the City of London Police Force, the Royal Irish Constabulary, and the Dublin Metropolitan Police Force ;

“Outworker” means a person to whom articles or materials are given out to be made up, cleaned, washed, altered, ornamented, finished, or repaired, or adapted for sale, in his own home or on other premises not under the control or management of the person who gave out the materials or articles ;

The exercise and performance of the powers and duties of a local or other public authority shall, for the purposes of this Act, be treated as the trade or business of the authority ;

“County court,” “judge of the county court,” “registrar of the county court,” “plaintiff,” and “rules of court,” as respects Scotland, mean respectively sheriff court, sheriff, sheriff clerk, pursuer, and act of sederunt.

A. “Employer.”

There are four main headings under which the cases decided under s. 13 may be grouped : (a) “Employer,” (b) “Workman,” (c) “Dependants,” (d) “Local or other Public Authority.” This present note is concerned with the first of the above groups ; the others will be considered *infra* under the appropriate heading.

To determine whether a particular person, or body of persons, is the employer of a particular workman, it is necessary for the arbitrator to investigate the nature of “the contract of service or apprenticeship” into which the workman has entered. The question is purely one of fact for the arbitrator (*Pollard v. Goole and Hull Steam Towing Co., Ltd.* [2435]), and his decision will not be upset unless there is no evidence to support it (*Reed v. Smith, Wilkinson & Co.* [2436]). It is often very difficult to ascertain who is the employer in cases where ships are chartered, or other similar mercantile undertakings (*Mackinnon v. Miller* [2437] ; *Gorman v. Gibson* [2438] ; *Kelly v. Miss Evans (Owners)* [2439]). Where a workman is temporarily lent or let on hire there must be a continuing contract of service between the workman and the lender or person letting for hire at the time of the lending or letting, and the contract of service must be such that the workman could not absent himself from work without the lender’s wish, otherwise the lender will not be liable (*Boswell v. Gilbert* [2440]), but the person to whom the “workman” is lent may be liable (*Wilmerson v. Lynn and Hamburg Steamship Co.* [2441]). As to the position of the legal personal representative of a deceased employer, see *In the Goods of Byrne (deceased)* [2442].

2435.—Pollard v. Goole and Hull Steam Towing Co., Ltd. (1910), 3 B. W. C. C. 360—C. A.

A workman was drowned while mooring a ship of the respondents ; he was paid by a stevedore, who worked for the respondents and other firms. The respondents contended that he was employed by the stevedore and not by them. The stevedore gave evidence that the money was paid through him merely for the convenience of the respondents. The county court judge held that the man was employed directly by the respondents and not by the stevedore.

HELD—that it was a question of fact, and that there was some evidence to support the county court judge's decision.

2436.—Reed v. Smith, Wilkinson & Co. (1910), 3 B. W. C. C. 223—C. A.

The respondents were owners of a threshing machine which they let out on hire to farmers. They were bound by statute to have three men to attend the machine, two to look after the engine, and a third as a "road man." At farms the road man acted as assistant in the threshing, being paid for this by the farmer and not by the respondents. While engaged in the threshing the applicant was injured.

HELD—that there was evidence to support the county court judge's finding of fact that the respondents were the man's employers and not the farmer.

2437.—Mackinnon v. Miller, [1909] S. C. 373 ; 46 Sc. L. R. 299—Ct. of Sess.

The registered owner of a vessel was, under a charterparty, bound to provide and pay a crew of two men, and had the sole power to dismiss them. The possession, control, and management of the vessel under the charterparty belonged to the charterer. After the vessel had been delivered to the charterer one of the crew appointed by the owner was killed.

HELD—that the owner, and not the charterer, was the person liable to pay compensation under the Workmen's Compensation Act, 1906.

Notes.—This case is also mentioned on another point [1953].

2438.—Gorman v. Gibson, [1910] S. C. 317 ; 47 Sc. L. R. 394—Ct. of Sess.

Shipping agents acting as managers of a vessel lying in Leith harbour contracted with a firm of merchants to load and carry a cargo of coal. The operation of loading was carried out by a squad of trimmers who, according to the harbour regulations, were selected by a gaffer nominated by the harbour commissioners and having the power to dismiss the men. The commissioners had no responsibility

for the conduct of the trimmers, who were directly under the control and superintendence of the shipping agents, by whom they were paid. The expenses of loading were deducted from the freight, the balance of which, less charges, was handed by the agents to the owners of the vessel. One of the trimmers, having sustained injury by an accident while engaged in loading the coal, claimed compensation under the Workmen's Compensation Act, 1906, from the shipping agents, who refused to pay the same on the ground that they were not the employers of the workman.

HELD—that the claimant was in the employment of the shipping agents at the date of the accident, and was entitled to claim compensation from them.

2439.—*Kelly v. Miss Evans (Owners)*, [1913] 2 Ir. R. 385; 47 Ir. L. T. 155; [1913] W. C. & I. Rep. 418—C. A.

The owners of a small coasting schooner, by written agreement, gave command thereof to K. on the following conditions: K. was to work the vessel on the best paying trade for the benefit of all concerned, receiving for his services two-thirds of all freights carried, out of which he was to pay all crew's wages, victuals of crew, port charges, towages, and all other expenses connected with the working of the vessel; the remaining one-third K. thereby agreed to remit to the owners as "owners' share." If K. had cause to give up command, and so advised the owners, and if requested, K. was to bring the vessel to A. free of charge. While K. was working the vessel under this agreement one of the crew whom he had engaged met with an accident for which he claimed compensation against the owners under the Workmen's Compensation Act, 1906.

HELD—that, on the true construction of the agreement, K. was acting merely as agent for the owners in hiring the crew, and that the relation of master and servant, within the meaning of the Act, existed between the applicant and the owners.

Notes.—*Boon v. Quance*, 3 B. W. C. C. 106 [2493], distinguished on the ground that "that case only decided that the relation of master and servant did not exist between the owner and the captain of the ship, and there was no question as to the relation between the owner and the crew."

2440.—*Boswell v. Gilbert* (1909), 127 L. T. Jo. 146; 2 B. W. C. C. 251—C. A.

The deceased was a farm labourer who was in the habit of working for different farmers at a day wage, coming and going when and as he wished. He worked for the respondent on and off during the greater part of five months. One morning he came to the respondent's farm prepared to work, and was told by the respondent's servant to go to another farmer, who had asked the respondent to lend him a man to help in threshing. While threshing there he met with an accident which caused his death. The county court judge decided that "contract of service" in s. 13, means a contract which was a continuing contract at the time when the workman was lent, and such

that the workman could not absent himself from work against his employer's wish without a breach thereof; and that there was no subsisting contract between the deceased and the respondent at the time of the accident.

HELD—that the county court judge had come to a right conclusion.

2441.—Wilmerson v. Lynn and Hamburg Steamship Co. (1913), 82 L. J. K. B. 1064; 109 L. T. 53; 57 S. J. 700; 29 T. L. R. 652; 6 B. W. C. C. 542; [1913] W. C. & I. Rep. 633—C. A.

A conservancy board under statutory provisions appointed and licensed a body of meters and weighers for their port. The board derived no pecuniary profit from their services. Only licensed meters and weighers could be employed in the port. They could be dismissed by the board. They were sent in rotation to persons desiring their services. Such persons paid for their services according to a fixed scale through the meters office of the board, and not directly. Such persons entirely controlled the actual work done, and could, if dissatisfied with a meter, dismiss him and ask for another licensed meter, but otherwise they had no power of selection and dismissal. A steamship company required a meter to weigh cotton cake on their steamer in the port. Weighing of cotton cake in the port was not compulsory, but the company wished it done there. In the course of his employment the meter sent by the board met with an accident. He claimed compensation from the company.

HELD—that there was evidence to justify the county court judge in finding that the meter was a "workman" and that the company were his "employers" within s. 13 of the Workmen's Compensation Act, 1906, and therefore liable to pay him compensation.

Notes.—*Doggett v. Waterloo Taxi-Cab Co.*, [1910] 2 K. B. 336 [2496]; *Simmons v. Heath Laundry Co.*, [1910] 1 K. B. 543 [2463], and *Smith v. General Motor Cab Co.*, [1911] A. C. 188 [2495], applied.

2442.—In the Goods of Byrne (deceased) (1910), 44 Ir. L. T. 98; 3 B. W. C. C. 591.

Where an injured workman received compensation regularly until the death of his employer, who died intestate, and the next of kin acted as executors *de son tort*, and refused to take out letters of administration, thus preventing the workman from taking proceedings against them, the court gave liberty to a nominee of the workman to take out a grant under s. 78 of the Probate Act, 1857, for the purpose only of substantiating proceedings to be taken by the workman for the recovery of compensation.

DEFINITIONS—*cont.*

B. "Workman."

BEFORE considering what classes of persons come within the broad definition of the term "workman" in s. 13 it will be necessary to consider the five classes of persons who are expressly excluded. These are—

Firstly, any person employed otherwise than by way of manual labour whose remuneration exceeds £250 a year. The term "remuneration," involves precisely the same considerations as the word "earnings," and thus a person's remuneration may exceed £250 a year, although his actual wages are less than that sum (*Skailes v. Blue Anchor Line* [2443]; *Dothie v. MacAndrew* [2444]). Any person employed by way of "manual labour" is a "workman" no matter how great his remuneration may be. There have been no decisions under the Workmen's Compensation Act, 1906, on the meaning of the words "manual labour," but reference may be made to decisions upon the meaning of the words as used in s. 10 of the Employers and Workmen Act, 1875, see p. 1401, *post*. According to a recent decision under the National Insurance Act, 1911, the true test would appear to be "whether any manual labour that he may do in the course of his service is the real substantial work for which he is engaged, or whether it is only incidental or accessory thereto" (*Re Dairymen's Foremen and Re Tailors' Cutters* [2445]).

Secondly, a person whose employment is of a casual nature, and who is employed otherwise than for the purposes of the employer's trade or business. Two conditions must be present to exclude a person from being a "workman" within the section, for the employment must be of a casual nature, and it must not be for the purposes of the employer's trade or business. Whether or not employment is of a casual nature, is a question of fact, but if a person is employed to do a particular job (*e.g.*, window cleaning) as and when wanted, there being no obligation on the employer to continue giving him that job, the employment will be "casual," even though the person has been employed frequently on that job, and expects to continue to be so employed. "In such a case he may not incorrectly be said to be regularly employed on an employment of a casual nature" (*per* Buckley, L.J., in *Hill v. Begg* [2446]; see also *Rennie v. Reed* [2448]; *Baker v. Danielsen* [2447]; *Cozens v. Rutherford* [2449]; *Ritchings v. Bryant* [2450]; *M'Carthy v. Norcott* [2451]; *Knight v. Bucknill* [2452]). But if there is an agreement between the parties for employment at definite periods (*e.g.*, the employment of a washerwoman on every Friday and alternate Tuesdays), the employment will not be of a casual nature (*Dewhurst v. Mather* [2453]). Employment of a casual nature "for the purposes of the employer's trade or business" has been held to include the repairing of the roof of a

building used only for business purposes (*Johnston v. Monasterevan General Store Co.* [2454]); the cutting of a hedge (*Tombs v. Bomford* [2455]); and the lopping of trees for a farmer (*Cotter v. Johnson* [2456]). See also *Rennie v. Reed* [2448]; *Bargewell v. Daniel* [2457]; and *Kelly v. Buchanan* [2458] on this point.

Thirdly, a member of a police force (see *Sudell v. Blackburn Corporation* [2460a]).

Fourthly, an outworker.

Fifthly, a member of the employer's family dwelling in his house (see *M'Dougall v. M'Dougall* [2460], and other cases mentioned).

With the exception of the five classes of persons mentioned the expression "workman" includes "any person who has entered into or works under a contract of service or apprenticeship with an employer, whether by way of manual labour, clerical work, or otherwise, and whether the contract is expressed or implied, is oral or in writing." Under the Act of 1897 the workman was only included if he was engaged in "any employment to which this Act applies," but under the present Act the workman need not be engaged in any specified employment. Further, under the old Act, it was necessary for a person to be a member of the working classes to come within the definition of the term "workman"; thus the manager of a mine (*Simpson v. Ebbw Vale Steel, Iron and Coal Co.* [2461]), and an expert chemist (*Bagnall v. Levinstein* [2462]), both of whom were paid by a fixed salary, were held not to be "workmen." These decisions are not applicable to the present Act. A contract of service under the present Act involves the relationship of master and servant, and it is for the arbitrator to determine as a question of fact whether this relationship exists (*Byrne v. Baltinglass Rural District Council* [2464]). We consider *Simmons v. Heath Laundry Co.* [2463] the leading case on this point. The principles upon which the county court judge must determine the question as to whether there is "a contract of service" may be gathered from the judgments in that case. There is a great difference between a contract "of service" and a contract "for services," for the latter relation does not bring the parties within the Act (*Wray v. Taylor* [2465]; *Murphy v. Enniscorthy Guardians* [2466]; *O'Connel v. Guardians of the Poor of Cork Union* [2467]). It has been held that a professional footballer is a "workman" (*Walker v. Crystal Palace Football Club* [2468]). It is necessary to distinguish between persons who are "workmen" and persons who are independent contractors, for only in the former case is there a contract "of service or apprenticeship with an employer." An independent contractor is not a "workman" even though he may assist in the work himself (*M'Gregor v. Dansken* [2469]; *Simmons v. Faulds* [2470]; *Chisholm v. Walker* [2471]; *Ryan v. Tipperary County Council* [2472]; but distinguish *O'Donnell v. Clare County Council* [2473]). An independent contractor may bring himself within the Act by stipulating with his employer that he shall be compensated in case of accident (*Evans v. Penwyllt Dinas Silica Brick Co.* [2474]). Where the employee is paid for piece-work, it is very difficult to determine whether the relationship of master and servant exists. The question is purely one of fact for the arbitrator (*Taylor v. Burnham* (No. 2) [2475]; *Doharty v. Boyd* [2476]; *Lewis v. Stanbridge* [2477]). In the cases

of *Vamplew v. Parkgate Iron and Steel Co.* [2478], and *Hayden v. Dick* [2479], the applicant was held to be a contractor. In the latter case the Lord Justice-Clerk applied the test that the employer could not have dismissed the employee as a servant. In the following cases the applicants were held to be workmen: *Paterson v. Lockhart* [2480]; *Clarke v. Bailieborough Co-operative Society* [2481]; *Moreney v. Sheehan* [2482]. Probably the best test is the power of control which can be exercised by the employer, if it is slight there will be evidence to justify a finding that the employee is an independent contractor (*Curtis v. Plumtre* [2483]; *Pears v. Gibbons* [2484]); but it may be such as to negative the existence of an independent contract (*M'Cready v. Dunlop* [2485]; *Jones v. Penwyllt Dinas Silica Brick Co.* [2486]).

Partners are not workmen within the meaning of the Act (*Ellis v. Joseph Ellis & Co.* [2487]; *Sharpe v. Carswell* [2413]; *Clark v. Jamieson* [2417]).

It is difficult to determine the position of masters or mates of ships who receive as remuneration a share in the profits of the vessel. It is for the arbitrator to determine as a question of fact whether the relationship between the shipowners and master is that of master and servant, or whether they are co-adventurers (*Jones v. Owners of S.S. Alice and Eliza* [2488]; *Smith v. Horlock* [2489]; *Ship Victoria (Owners) v. Barlow* [2490]; *Cole v. Shrubshall* [2491]). The burden of proof that the relationship of master and servant existed is upon the applicant (*Hoare v. Barge Cecil Rhodes (Owners)*) [2492]. A contract of service was held not to exist where the master had complete control over the movements of the vessel (*Boon v. Quance* [2493]; *Hughes v. Postlethwaite* [2494]). The same considerations apply to the position of taxi-cab drivers who hire their cabs for the day, the relationship between them and the taxi-cab company will usually be that of bailor and bailee, but the question is one of fact to be determined by the arbitrator (*Smith v. General Motor Cab Co.* [2495]; *Doggett v. Waterloo Taxi-Cab Co.* [2496]).

The conditions under which persons are received into religious and charitable institutions may or may not constitute a contract of service. It is for the applicant to prove that there was a contract of service (*Burns v. Manchester and Salford Mission* [2497]). The employment of a pauper is not contractual but statutory (*Tozeland v. West Ham Union* [2498]), but there may be a contract of service in the case of destitute persons doing work for relief, for such persons are not bound to go to the institute and the institute is not bound to receive them (*Porton v. Central (Unemployed) Body for London* [2499]; *Gilroy v. Mackie* [2500]; *MacGillivray v. Northern Counties Institute for the Blind* [2501]).

It has been decided under the National Insurance Act, 1911, that the following persons are not employed under a "contract of service" within the meaning of that Act: A curate of the Church of England (*In re Employment of Church of England Curates* [2502]); a minister of the United Methodist Church (*In re Employment of Ministers of the United Methodist Church* [2503]); the medical staff of an infirmary (*Scottish Insurance Commissioners v. Royal Infirmary of Edinburgh* [2504]). It is submitted that the above persons are not "workmen" under the Workmen's Compensation Act.

The cases are arranged as follows :—

I. Persons expressly Excluded from the Definition of “Workman.”

- (1) Persons whose Remuneration exceeds £250 a Year.
- (2) Casual Labourers.
- (3) Police Force.
- (4) Employer's Family.

II. Meaning of the Term “Workman.”

- (1) Meaning under 1897 Act.
- (2) Contract of Service.
- (3) Independent Contractors.
- (4) Partners.
- (5) Co-adventurers and Bailees.
- (6) Religious and Charitable Institutions.

I. Persons Expressly Excluded from the Definition of "Workman."

(1) *Persons whose Remuneration exceeds £250 a Year.*

2443.—*Skailles v. Blue Anchor Line*, [1911] 1 K. B. 360 ; 80 L. J. K. B. 442 ; 103 L. T. 741 ; 4 B. W. C. C. 16 ; 55 S. J. 107 ; 27 T. L. R. 119—C. A.

In determining whether the "remuneration" of any person employed otherwise than by way of manual labour exceeds £250 a year, the court should have regard to the actual total earnings of such person and should include bonuses paid him by his employers on his giving satisfaction, as well as profits made by him with his employers' knowledge.

Notes.—This was an application by the widow of the purser of the ship *Waratah*, which was lost with all hands. The claim was resisted on the ground that the purser's remuneration exceeded £250 a year. It appeared that his wages were £8 a month plus "conditional money" of £1 a month during the first year and £2 a month afterwards, which was paid when everything on the voyage was satisfactory. He was supplied with whisky at 4s. a bottle, and was allowed to sell it in sixpenny nips and keep the profits. He also received commission on the sale of wines, etc. The majority of the court (Fletcher Moulton, L.J., *diss.*) decided that the "conditional money" and profits on nips were part of his remuneration, and not voluntary gratuities. In his judgment Cozens-Hardy, M.R., said : "remuneration involves precisely the same considerations as earnings. I do not think it is open to this Court, after our decision in *Dothie v. MacAndrew & Co.* [2444], to take any other view." As to profits on nips being earnings, *Penn v. Spiers and Pond*, [1908] 1 K. B. 766 [2656], applied.

2444.—*Dothie v. MacAndrew & Co.*, [1908] 1 K. B. 803 ; 77 L. J. K. B. 388 ; 98 L. T. 495 ; 24 T. L. R. 326—C. A.

Upon a claim for compensation by the dependants of a ship's captain, it appeared that the remuneration of the deceased was £216 a year in cash, in addition to his board.

HELD—that, in measuring the money value of reasonable food and allowances provided by the shipowners as part of the shipmaster's remuneration, the true test is not what the shipmaster would have himself spent if he had not been provided for—in other words, what he saved by living on board ship—but what is the actual value to him of the food and allowances so provided.

Notes.—*Great Northern Railway v. Dawson*, [1905] 1 K. B. 331 [2647], referred to. This case was remitted to the county court judge to determine whether, upon applying the above test, the remuneration of the deceased exceeded £250 a year.

2445.—Re Dairymen's Foremen and Re Tailors' Cutters (1912), 28 T. L. R. 587; 107 L. T. 342; [1912] W. N. 229—Eady, J.

The question whether a person is employed in manual labour within the meaning of Schedule I., Part II., clause (g) of the National Insurance Act, 1911, is to be determined by considering whether any manual labour that he may do in the course of his service is the real substantial work for which he is engaged, or whether it is only incidental or accessory thereto. If it is the latter the employment is not manual labour.

HELD—that the employments of a dairyman's foreman and a tailor's cutter are not employment in manual labour within the National Insurance Act, 1911, inasmuch as, although those persons did some manual work, their duties were mainly supervisory.

Notes.—*Bound v. Lawrence*, [1892] 1 Q. B. 226 [3093]; *Morgan v. London General Omnibus Co.*, 13 Q. B. D. 833 [3090], referred to. See also *Cook v. North Metropolitan Tramway Co.* [3091]; *Smith v. Associated Omnibus Co.* [3094], and other decisions on the meaning of the word "workman" in s. 10 of the Employers and Workmen Act, 1875.

(2) *Casual Labourers.*

2446.—Hill v. Begg, [1908] 2 K. B. 802; 77 L. J. K. B. 1074; 99 L. T. 104; 24 T. L. R. 711; 52 S. J. 581—C. A.

A man who did odd jobs for different persons, but whose principal occupation was window cleaning, was engaged in cleaning the windows of the private dwelling-house of his employer, a member of the Stock Exchange, and whilst so engaged met with a fatal accident. For about two years prior to the accident he had cleaned the windows at intervals varying from three to six weeks. He used to be sent for when the windows required cleaning, and was paid 6s. 6d. each time he came, but there was no contract, either permanent or periodic, of employment or service.

HELD—that the employment of the deceased was "employment of a casual nature," and that not having been employed for the purposes of his employer's trade or business, he was not a "workman" within s. 13 of the Workmen's Compensation Act, 1906, and that therefore the employer was not liable under the Act.

Notes.—In his judgment Buckley, L.J., said: "Suppose that a host, when from time to time he entertains his friends at dinner or his wife gives a reception at a dance, has been in the habit for many years of employing the same men to come in and wait at his table, or assist at the reception, it may be said that their employment is regular. But the employment is of a casual nature. It depends upon the whim . . . of the host whether he gives any, and how many dinner parties or receptions. . . . In such a case the waiters may not incorrectly be said to be regularly employed in an employment of a casual nature." See *Dewhurst v. Mather* [2453].

2447.—Baker v. Danielsen (1910), 128 L. T. J. 366—County Court.

HELD (on the facts)—that a window cleaner was not a “workman,” his employment being of a casual nature.

Notes.—*Hill v. Begg* [2446]; *Dewhurst v. Mather* [2453], applied.

2448.—Rennie v. Reid, [1908] S. C. 1051; 45 S. L. R. 814; 1 B. W. C. C. 324—Ct. of Sess.

A jobbing window cleaner was in use about once a month to clean the windows of the house of a medical practitioner who used a portion of the house in connection with his professional practice. There was no formal contract between the parties, and the window cleaner called and did the work without receiving on each occasion a special invitation or special permission to do so. On one occasion while cleaning the window of the dining-room he fell and was injured.

HELD—that the window cleaner’s employment was of a casual nature, and that he was not employed for the purposes of the employer’s trade or business, and that he was therefore not entitled to compensation.

Notes.—In dealing with the argument that the cleaning of the surgery windows was employment for the purposes of the respondent’s business, Lord Stormonth Darling said: “In my opinion it would be absurd to make the respondent’s liability to compensate the appellant turn upon the question whether the appellant had or had not, on the particular occasions on which he went to the house, cleaned the windows of the surgery as well as the other windows of the house. Essentially the employment was in connection with the respondent’s private residence, and not for the purposes of his business.” *Hill v. Begg* [2446] followed.

2449.—Cozens v. Rutherford (1908), 52 S. J. 700—County Court.

HELD, on the facts—that a man who was employed to keep clean the windows of a house, who did so at such times as suited him, was not casually employed, but, further, that he was an independent contractor and not a workman entitled to compensation.

Notes.—*Hill v. Begg* [2446]; *Vamplew v. Parkgate Iron and Steel Co.*, [1903] 1 K. B. 851 [2478], referred to.

2450.—Ritchings v. Bryant (1913), 6 B. W. C. C. 183; [1913] W. C. & I. Rep. 171—C. A.

A window cleaner cleaned the windows of the same employer once a month for four years, when he fell and was killed. No arrangements as to future work were made.

HELD—that there was evidence to support the finding of the county court judge that the employment was of a casual nature.

2451.—M’Carthy v. Norcott, (1908) 43 Ir. L. T. 17; 2 B. W. C. C. 279—C. A. (Ir.)

A carpenter named M. was employed by N. to do repairs to his house, for which he was to be paid at the rate of 4s. a day. While

these repairs were in progress N. engaged some men from a timber yard to cut down certain trees close to his house. These men commenced the cutting down of the trees, and whilst they were so engaged N. had a conversation with M. about the trees. M. said that when he had finished the repairs to the house he would cut down the trees, and that it would cost N. less than he was paying the other men. N. agreed to this, the arrangement being that M. was to be paid at the same rate as for the repairs, viz., 5s. a day. When M. had finished the repairs the services of the men at the trees were dispensed with, and M. started to cut and lop the remaining trees. Whilst so employed he fell from a ladder and was killed.

HELD—that the employment was of a casual nature, and that N. was not liable to pay compensation under the Workmen's Compensation Act, 1906.

2452.—Knight v. Bucknill, [1913] W. C. & I. Rep. 175; 6 B. W. C. C. 160; 57 S. J. 245—C. A.

A man who described himself as a jobbing gardener was employed at a daily wage in lopping trees and doing other work in a private garden for a period which had lasted five weeks, when he was incapacitated by accident.

HELD, in a claim for compensation—that he was not a “workman” within the definition of the Act, as his employment was of a casual nature.

Notes.—*Per* Cozens-Hardy, M.R.: “A country gentleman has what I may call his regular establishment to do his ordinary work in the garden, stables, and so forth, but at certain times in the year, and for certain limited purposes, he gets in persons not on his establishment to help—persons who may be got rid of without notice, and who are under no obligation to the employer to come and work. An example of this occurred in *Hill v. Begg* [2446]. It seems to me that persons such as these are persons ‘whose employment is of a casual nature,’ in the language of the Act as interpreted by this Court in *Hill v. Begg*, and *Dewhurst v. Mather* [2453]; and by the Irish Court of Appeal in *M'Carthy v. Norcott* [2451].”

2453.—Dewhurst v. Mather, [1908] 2 K. B. 754; 77 L. J. K. B. 1077; 99 L. T. 568; 24 T. L. R. 819; 52 S. J. 681—C. A.

A washerwoman and charwoman was engaged in washing clothes at the private house of a man and his wife, when she met with an accident to her left hand and was permanently incapacitated. For about eighteen months prior to the accident, which happened on a Tuesday, she had been in the habit of going to the house every Friday and on alternate Tuesdays, for the purpose of washing, and on other days of the week she washed and cleaned for different persons, and also did washing at her own home. She made a claim under the Workmen's Compensation Act, 1906, and the county court judge found that she was not in the casual but in the regular employment of the man and his wife, and he made an award in her favour based on her aggregate earnings in the different employments.

HELD—that there was ample evidence to justify the finding; that consequently the applicant was a “workman” engaged under “a contract of service” within s. 13 of the Act, under which the employment was not “of a casual nature,” but was periodical and regular; and that with regard to the measure of compensation the case was within Schedule I., clause 1, sub-s. 2 (b) of the Act.

Notes.—*Hill v. Begg*, [1908] 2 K. B. 802 [2446], distinguished on the ground (*per* Cozens-Hardy, M.R.) that in that case “there was no agreement between the parties for either permanent or periodical employment,” whilst in the present case “it was an employment of a regular nature. It was for definite periods perfectly well known to employer and employee.” Farwell, L.J., said: “If the applicant had presented herself at Mrs. Mather’s house on the Friday, and Mrs. Mather had told her that she did not want her and would not pay her, in my opinion she would have had a good cause of action.”

2454.—*Johnston v. Monasterevan General Store Co.*, [1909] 2 Ir. R. 108; 42 Ir. L. T. 268; 2 B. W. C. C. 183—C. A.

A labourer was employed to assist in repairing the roof of a house in which a drapery, grocery, and hardware business was carried on by the employers. The employment was casual. The assistants in the business occupied the dwelling part of the house over the shop. It was the duty of the manageress to have the premises in proper condition for carrying on the business. While engaged in repairs to the roof the labourer met with the accident which caused his death.

HELD—that at the time of his death he was employed for the purpose of the employer’s business, and that his dependants were entitled to compensation under the Workmen’s Compensation Act, 1906.

Notes.—*Wrigley v. Bagley*, [1901] 1 K. B. 780 [2333], cited.

2455.—*Tombs v. Bomford* (1912), 106 L. T. 823; 5 B. W. C. C. 338; [1912] W. C. Rep. 229—C. A.

A labourer owned a small garden surrounded by a hedge and land belonging to a farmer. He complained to the farmer that the hedge had grown so high that it cast shade across his garden, and requested him to cut it. The farmer, being too busy, told the man to cut it himself, for which he would pay him 10s. The long wood from the hedge was to be used for hop-poles for the farmer. The man injured his eye whilst cutting the hedge. The county court judge found that the employment was of a casual nature for the purposes of the farmer’s trade or business, and awarded compensation.

HELD—that there was evidence to support the finding.

Notes.—*Per* Cozens-Hardy, M.R.: “The man was not a contractor; the work was of a casual nature, but in my opinion, that does not affect the case, as the employment certainly was for the purposes of the farmer’s trade or business. In the case of *Rennie v. Reed*, [1908] S. C. 1051 [2448], the mere fact that the doctor had a surgery at his private house did not make any difference as to whether

a window cleaner was employed for the purpose of the doctor's business."

2456.—*Cotter v. Johnson* (1911), 45 Ir. L. T. 259 ; 5 B. W. C. C. 568—C. A. (Ir.).

A retired doctor farmed some 215 acres for profit. The swaying of some trees shook the roots, and thereby injured the wall of his haggard. He employed a man casually to lop the trees.

HELD—that the employment was for the purposes of the employer's trade or business.

Notes.—*Johnston v. Monasterevan General Store Co.* [2454] followed.

2457.—*Bargewell v. Daniel* (1908), 98 L. T. 257—C. A.

The defendant owned several houses and was co-owner of three others, which were let to weekly tenants. She collected the rents and generally managed the property, accounting to the other co-owners for rent received on their behalf, but they paid her nothing for so doing.

HELD—that she was not carrying on the business of an estate agent within the Workmen's Compensation Act, 1906, so as to be liable to compensate a workman whose employment was of a casual nature, and who met with an accident while engaged in doing some repairs to the houses.

2458.—*Kelly v. Buchanan*, [1913] W. C. & I. Rep. 727 ; 47 Ir. L. T. R. 228—C. A. (Ir.).

A casual labourer engaged by a shopkeeper to repair houses disconnected from the shop and occupied by tenants is not employed for the purposes of "the trade or business" of the employer.

Notes.—*Bargewell v. Daniel* [2457] followed.

2459.—*M'Cann v. M'Donnell*, [1913] W. C. & I. Rep. 728, n.—C. A. (Ir.).

The employer was a publican and also the owner of fifteen houses in one street and nine in another, let to tenants. M'Cann was a plasterer and a handyman who was employed occasionally by M'Donnell to repair these houses at the rate of 4*d.* per hour, the employer supplying the materials. On January 2nd, 1913, the appellant was employed to repair the ceiling in one of the houses, and whilst so engaged a bit of the plaster fell and injured his eye. The Recorder of Belfast found that he was a casual workman, and that he was not employed for the purposes of the employer's trade or business. The court, without calling on counsel for the respondent, affirmed the decision of the Recorder, holding that the case was governed by *Bargewell v. Daniel* [2457].

(3) *Police Force.*

2460a.—Sudell v. Blackburn Corporation (1910), 3 B. W. C. C. 227—C. A.

When a police constable acts as a fireman in pursuance of any duty under an Act of Parliament, he is acting as a member of a police force, and is not a “workman” within the meaning of s. 13 of the Workmen’s Compensation Act, 1906.

(4) *Employer’s Family.*

2460.—M’Dougall v. M’Dougall, [1911] S. C. 426 ; 48 Sc. L. R. 315 ; 4 B. W. C. C. 373—Ct. of Sess.

A man, aged twenty-six, employed by his father, lived with him and paid him board and lodging. He was injured while absent for several weeks on his employer’s business.

HELD—that he was a “member” of his employer’s family, “dwelling in his house,” and therefore was not a workman entitled to compensation within s. 13 of the Workmen’s Compensation Act, 1906.

Notes.—*Per* Lord Ardwell : “A man’s dwelling-place or dwelling in ordinary language is his habitation, his place of residence, or his abode, which when he leaves he is considered to be on a journey, and to which he returns when his journey is finished, and in the pursuer’s case the only house that answers to this description is his father’s house in Glasgow.” See also *Marks v. Carne*, [1909] 2 K. B. 516 [2339].

II. *Meaning of the Term “Workman.”*(1) *Meaning under 1897 Act.*

2461.—Simpson v. Ebbw Vale Steel, Iron, and Coal Co., [1905] 1 K. B. 453 ; 74 L. J. K. B. 347 ; 92 L. T. 282 ; 53 W. R. 390 ; 21 T. L. R. 209—C. A.

A certificated manager of a mine, appointed under the Mines Regulation Act, 1887, who is paid a fixed yearly salary, but does not do any manual labour, is not a “workman” within the meaning of that term as defined in s. 7, sub-s. 2, of the Workmen’s Compensation Act, 1897.

Notes.—See *Simmons v. Heath Laundry Co.* [2463].

2462.—Bagnall v. Levinstein, [1907] 1 K. B. 531 ; 76 L. J. K. B. 234 ; 96 L. T. 184 ; 23 T. L. R. 165 ; 51 S. J. 430—C. A.

By an agreement in writing between a company of chemical and dye manufacturers and one B., who held the degree of master of science, the duration of which agreement was to be five years, B. agreed to give his whole time to serve the company and endeavour to promote its success, to obey all orders in such work as might be allotted to him, to put at the disposal of the company the results of his work, whether they might lead to the improvement of existing

methods of manufacture or concern the production of new bodies, the company being entitled to make use of the work or research and their results as they might think fit; and the company agreed to pay B. a yearly salary of £200 for the first year, rising by annual increases to £260 for the fifth year, payable by monthly instalments, and a commission on net profits of inventions, improvements, or discoveries which should justify a patent being taken out. B. did no research work. His work, in fact, consisted of manual labour involving scientific knowledge. He was employed on sulphur colours, his duties being to see that the daily manufacture was carried out, to turn on steam, to place the taps for blowing over liquor in boxes, to take samples to the laboratory to test, and where the colours were important, to charge the pan himself. He was dressed like the ordinary workmen, and worked amongst the chemicals like them, but his name was not in the wages book like theirs, and his hours were somewhat later than theirs.

HELD (Farwell, L.J., *diss.*)—that B. was not a “workman” within the meaning of s. 7, sub-s. 2, of the Workmen's Compensation Act, 1897.

Notes.—This case would probably be decided to the contrary under the present Act. *Simpson v. Ebbw Vale Steel, Iron and Coal Co.* [2461] applied. *Hoddinott v. Newton, Chambers & Co.*, [1901] A. C. 49 [2854]; *Jackson v. Hill*, 13 Q. B. D. 618 [3100], referred to. See also *Simmons v. Heath Laundry Co.* [2463].

(2) “*Contract of Service.*”

2463.—*Simmons v. Heath Laundry Co.*, [1910] 1 K. B. 543; 79 L. J. K. B. 395; 102 L. T. 210; 54 S. J. 392; 26 T. L. R. 326—C. A.

The applicant was employed in a laundry, at 7s. a week wages, where she met with an accident to her hand. She was also earning 3s. a week by teaching music in her spare time to a neighbour's children. The county court judge held that the applicant was not entitled to compensation under paragraph (2) (b) of Schedule I. to the Workmen's Compensation Act, 1906, on the footing of having entered into “concurrent contracts of service” with two employers, but only under paragraph (1) (a) on the footing of the weekly wages of 7s.

HELD—that the question whether an applicant in any particular case was a workman within the Act was a question of fact, and there was evidence to support the finding of the county court judge.

Notes.—In this case the meaning of the term “contract of service” in the Workmen's Compensation Act, 1906, was discussed at length. Cozens-Hardy, M.R., and Fletcher Moulton, L.J., did not consider that it was possible to lay down any complete or satisfactory definition of the term, as it was a question of fact to be decided by the arbitrator on all the circumstances of the case. Buckley, L.J., said: “I do not know whether it is possible to approach more closely to an answer to the question as to what is a contract of service under this Act than to say that in each case the question to be asked is what was the man employed to do; was he employed upon the terms that he should within the scope of his employment obey his

master's orders, or was he employed to exercise his skill and achieve an indicated result in such manner as in his judgment was most likely to ensure success? Was his contract a contract of service within the meaning which an ordinary person would give to the words? Was it a contract under which he could be appropriately described as the servant of the employer? If the question which the county court judge puts to himself is that question, and his answer is given in view of those principles, then I think his finding is a finding of fact." The Lord Justice also said: "The Act of 1906 differs in that it defines workman as 'meaning certain persons. Under these circumstances the reasoning in *Simpson v. Ebbw Vale Steel, Iron and Coal Co.*, [1905] 1 K. B. 453 [2461] is not strictly applicable to this case. But I think it is instructive because the question under the present Act as to the meaning of the words 'contract of service' may be again whether those words do not in this Act import that which an ordinary person would understand by a contract of service." The Master of the Rolls said: "I am far from saying that a teacher may not be within the Act, the words 'or otherwise' being sufficient to cover such a case. An usher in a private school, or a teacher in a provided or non-provided school, or a nursery governess would, under ordinary circumstances, be entitled to claim the benefit of the Act. On the other hand, it would, I think be absurd to hold that a skilled music master who gives lessons to a pupil, either in his own house or in the pupil's house, is to be regarded as the 'workman' the pupil as the 'employer.' In such a case there may be a contract for services, but there is not a contract of service. In any particular case it will be for the arbitrator, after considering all the circumstances, to decide whether the injured professional person is or is not a 'workman.'" *Yewens v. Noakes* (1880), 6 Q. B. D. 530; *Sadler v. Henlock*, 4 E. & B. 570; *Walker v. Crystal Palace Football Club*, [1910] 1 K. B. 87 [2468]; *Bagnall v. Levinstein* [2462], referred to.

2464.—*Byrne v. Baltinglass Rural District Council* (1911), 45 I. L. T. 206; 5 B. W. C. C. 566—C. A. (Ir.)

A man having a contract to build labourers' cottages agreed with a mason for the latter to do the work. The contractor supplied the materials, and paid the mason by the day for the work he did. The mason had to do the work within the time allowed by the head contract, and to the satisfaction of the surveyor under the head contract. He was not bound to work continuously, and did not do so, but worked for other people during the time of building. The county court judge found that the mason was not under a contract of service with the contractor.

HELD—that there was evidence to support the finding.

2465.—*Wray v. Taylor Brothers & Co.*, [1913] W. C. & I. Rep. 446; 109 L. T. 120; 6 B. W. C. C. 531—C. A.

A workman, who was employed as a steel-tester, was permitted by his employers to occupy a cottage adjoining their offices on the terms of a written memorandum by which he agreed to be responsible for the cleaning of the offices and other duties, in return for which he

could live in the cottage, rent and rates free, with coal and light provided. The cleaning and other duties were performed by his daughters. The workman was killed while sleeping in the cottage by the escape of gas from a stove in the basement of the offices into his bedroom. On an application for compensation by his dependants it was held that death had been caused by an accident arising out of and in the course of the employment, the memorandum constituting a contract of service by which the workman was obliged to sleep in the cottage, and compensation was awarded.

HELD (Kennedy, L.J., *diss.*)—that the written memorandum was merely a tenancy agreement embodying a contract for services, and that there was no evidence to support the award of the county court judge.

Notes.—*Per* Cozens Hardy, M.R.: “The contract was not a contract of service but for services, and if that be so there is an end to the case, because, unless there is the relation of employer and servant existing at the time of the accident, no claim under this Act can be made.”

See also *Whitbread v. Arnold* (1903), 99 L. T. 103 [2117].

2466.—Murphy v. Enniscorthy Guardians, [1908] 2 Ir. R. 609; 73 J. P. 63—C. A. (Ir.).

There is no contract of service between a dispensary doctor and the poor law guardians of his district within the meaning of s. 13 of the Workmen's Compensation Act, 1906, involving liability on the guardians in the event of his accidental injury or death in the discharge of his duties.

2467.—O'Connell v. Guardians of the Poor of Cork Union (1913), 47 Ir. L. T. 55—Recorder of Cork.

The relation between guardians of the poor and an employee is not that of employer and workman within the meaning of the Workmen's Compensation Act, 1906, as no “contract of service” exists between them, and therefore such workman is not entitled to claim compensation against the guardians.

Notes.—*Murphy v. Enniscorthy Guardians* [2466] and *Re Employment of Poor Law Officers*, 47 Ir. L. T. 28, applied.

2468.—Walker v. Crystal Palace Football Club, [1910] 1 K. B. 87; 79 L. J. K. B. 229; 101 L. T. 645; 54 S. J. 65; 26 T. L. R. 71—C. A.

The applicant was engaged by the Crystal Palace Football Club, Ltd., as a professional football player at a weekly wage, and he agreed to give his whole time to the club, to attend regularly to training, and to observe the training and general instructions of the club. While playing in a football match the applicant met with an accident which incapacitated him from earning wages in any suitable employment.

HELD—that the applicant was a “workman” within the defini-

tion in s. 13 of the Workmen's Compensation Act, 1906, and that he was entitled to compensation under the Act.

Notes.—In his judgment Cozens-Hardy, M.R., said : “ The man agrees to devote his whole time, to attend regularly on certain days and hours, not merely for the purpose of playing, but for the purpose of training, and there are a number of detailed regulations, which the man is bound to observe and comply with. That being conceded, we have to consider, not whether this man is a ‘ workman ’ in the ordinary sense in which that word would be used in conversation in the street, without any reference to the provisions of this Act, but is he or is he not a ‘ workman ’ within the definition which is found in s. 13. . . . I feel myself quite unable to entertain any doubt that this man has entered into a contract of service with the club. I think it was a contract by way of manual labour, but, whether it was so or not, I think it is a contract which plainly comes within those words ‘ or otherwise,’ and that we should be narrowing the Act most unduly if we were to say this man was not entitled to get compensation as the result of the accident.”

See also *Waites v. Franco-British Exhibition*, 25 T. L. R. 441 [2326].

(3) *Independent Contractors.*

2469.—*M'Gregor v. Dansken* (1899), 1 F. 536 ; 36 S. L. R. 393—Ct. of Sess.

HELD—that a man who had contracted with the owner of a building to repair it, and who was injured whilst engaged working on slater work upon the building, was not a “ workman ” within the meaning of the Workmen's Compensation Act, 1897.

Notes.—*Per* the Lord Justice-Clerk : “ But if it is the contractor himself who is injured, and if a contractor is entitled to compensation under the Act, then if the undertaker had to pay the compensation he could have no relief, for he cannot demand to be relieved by the contractor for that which he has paid to the contractor himself.”

See also and consider *Skates v. Jones* [2314] ; *Stalker v. Wallace* [2324] ; *Brine v. May, Ellis, Grace & Co.* (No. 2) [2325] ; and *Paterson v. Lockhart* [2480].

2470.—*Simmons v. Faulds* (1901), 65 J. P. 371 ; 17 T. L. R. 352—C. A.

The applicant tendered to the respondent for the supply of labour and tools to carry out the bricklaying work upon the respondent's building for a certain sum. He worked on the job as a foreman bricklayer, but he received no wages.

HELD—that he was not a “ workman,” but a sub-contractor, and therefore not entitled to claim compensation in respect of injuries sustained by him while engaged on the work.

2471.—*Chisholm v. Walker*, [1909] S. C. 31 ; 46 Sc. L. R. 24 ; 2 B. W. C. C. 261—Ct. of Sess.

C. agreed with a timber merchant to bring his horse, when required, to drag logs from one place to another, for which he was

paid at the rate of 8s. per day. His share of the work was confined to leading the horse, and this he might have done by means of a substitute, there being no contract that he should perform the work personally. C. having sustained injury by an accident while engaged in this work claimed compensation.

HELD—that he was an independent contractor and not a workman within the meaning of the Workmen's Compensation Act, 1906.

Notes.—*Per* the Lord Justice-Clerk: "The contract was that he should get the work done. It was not a contract that he should do the work personally, but that he should do it, in the only way in which it could be done, by having somebody to lead the horse. That is not a contract of service. The case of *Paterson v. Lockhart*, 7 F. 954 [2480], was quite different. There the man claiming compensation was bound to do the work at so much a day."

2472.—*Ryan v. Tipperary, South Riding, County Council* (1912), 46 Ir. L. T. 69; 5 B. W. C. C. 578; [1912] W. C. Rep. 195—C. A. (Ir.).

The owner of a horse and cart from time to time removed stones for a county council from a quarry to such parts of the public roads as were indicated to him by a road steward. He was paid at the rate of 5s. a day if he drew the full number of loads prescribed; he did not work continuously for the county council; he was free to do, and in fact did, carting for others. There was no obligation on him to come to the quarry and draw the stones or to draw any special number of loads in the day.

HELD—that the owner of the horse and cart so engaged was not a "workman" within the meaning of the Workmen's Compensation Act, 1906.

Notes.—*Chisholm v. Walker* [2471] followed.

2473.—*O'Donnell v. Clare County Council* (1912), 47 Ir. L. T. 41; 6 B. W. C. C. 457—C. A. (Ir.).

The applicant was employed by the road overseer of the county council to draw stones from a quarry, and used for the purpose a horse and cart belonging to his father. His wages were to be at the rate of 5s. a day. There was some evidence of control on the part of an overseer or ganger of the county council. There was evidence that he was to get work a day now and again when there would be work to do, and there was no objection to his working for someone else when he was not wanted badly by the county council.

HELD—that the applicant was employed under a contract of service and was a "workman" within the meaning of s. 13 of the Workmen's Compensation Act, 1906.

Notes.—*Ryan v. Tipperary, South Riding, County Council* (1912), 46 Ir. L. T. 69 [2472], was distinguished.

2474.—Evans v. Penwyllt Dinas Silica Brick Co. (1901), 18 T. L. R. 58—C. A.

The applicant was a quarryman employed under a written agreement on the terms that he should be paid so much for every ton of material worked by him. His tools were found for him, and he hired and discharged the men who worked under him. Being in doubt as to his position, he gave notice to terminate his employment, and the employers' manager then said that he would see that he was compensated in case of accident, and the applicant resumed his employment.

HELD—that there was evidence upon which the county court judge was justified in finding that the applicant was a "workman" within the meaning of the Workmen's Compensation Act, 1897, and not a contractor.

Notes.—Collins, M.R., in his judgment said the man "took the opportunity of stipulating that he should be entitled to compensation in the event of an accident, and then proceeded to work on those terms. That certainly went to show that he was a workman within the Act." See also *Reed v. Smith, Wilkinson & Co.* [2436], and *Vamplew v. Parkgate Iron and Steel Co.* [2478].

2475.—Taylor v. Burnham & Co. (No. 2), [1910] S. C. 705; 47 Sc. L. R. 643; 3 B. W. C. C. 569—Ct. of Sess.

The applicant, a workman, whose trade was the fixing of enamel letters to windows, had been for a year in the habit of calling on a firm who made and dealt in enamel letters, and obtaining work from them. He was paid by the piece, defrayed his own travelling expenses, and was under no obligation to undertake any particular job. He frequently canvassed for orders for the firm, being only paid for the orders he received. He was at liberty to accept, and occasionally he did accept, work from other employers. In a claim for compensation under the Workmen's Compensation Act, 1906, the arbitrator held that the applicant was a "workman" within the meaning of the Act. On appeal the employers contended that the applicant was an independent contractor, but the court refused to interfere with the arbitrator's finding, holding that it was impossible to say on the facts that the arbitrator was wrong.

Notes.—This case is also mentioned on another point [2420] *ante*.

2476.—Doharty v. Boyd, [1909] S. C. 87; 46 Sc. L. R. 71; 2 B. W. C. C. 257—Ct. of Sess.

A stonebreaker engaged by a contractor to break stones for road metal at the rate of 2s. 2d. per cubic yard of metal broken, and subject to the orders of the contractor, and to dismissal by him :

HELD—to be a "workman" within s. 13 of the Workmen's Compensation Act, 1906, and not an independent contractor.

In an arbitration under the Workmen's Compensation Act, 1906, the arbitrator found that the workman was permanently incapacitated for work at his trade as a stonebreaker and that there was no proof of

his being able to earn wages in his present condition, and awarded compensation. On appeal, the employer contended that there was no finding in fact to the effect that the workman was incapacitated for other work than stonebreaking. The court refused to interfere with the determination of the arbitrator.

Per Lord McLaren : "It is the practice of the court not to interfere with the arbitrator's finding where any possibility of injustice can be obviated by subsequent application for review."

Observations upon the meaning of incapacity.

2477.—*Lewis v. Stanbridge*, [1913] W. C. & I. Rep. 515 ; 6 B. W. C. C. 568—C. A.

The applicant carried on business as a painter and paper-hanger for many years, and, besides doing work on his own account, he also worked for the respondent and other persons in the building trade. On October 12th, 1912, he was working for the respondent when a plank broke and he fell and was injured. There was evidence that the respondent employed the applicant on piecework on the terms that the applicant supplied his own paste box, pail, and brush, and that the respondent provided other things such as steps, planks, and paper. The respondent used to tell the applicant what house to work on and there was some evidence that he sometimes directed which room or part of a room was to be done, or generally how the work was to be done. The applicant was paid on sending in his account, and for this purpose the applicant used bills for which a bill-head containing the words, "Dr. to J. S. Lewis, Decorator, etc," had been cut off. It was suggested that the respondent had referred to the applicant as one of his men.

HELD—that there was evidence from which the county court judge might reasonably infer that the applicant was not working at the time of the accident as an independent contractor, but as a "workman" within the meaning of s. 13 of the Workmen's Compensation Act, 1906.

2478.—*Vamplew v. Parkgate Iron and Steel Co.*, [1903] 1 K. B. 851 ; 72 L. J. K. B. 575 ; 88 L. T. 756 ; 51 W. R. 691 ; 67 J. P. 417 ; 19 T. L. R. 421—C. A.

In an arbitration under the Workmen's Compensation Act, 1897, upon a claim by the dependants of a man who was killed by an accident while at work upon the premises of the respondents, the evidence was that the deceased man worked for the respondents at breaking steel and clearing cinders, that he was paid by tonnage, and that he had five or six men working under him whom he employed and paid on his own account.

HELD—that the county court judge was justified in finding that the deceased man was not a "workman" in the employment of the respondents within the meaning of the Act.

Notes.—*Simmons v. Faulds* [2470] referred to. *Evans v. Penwyllt Dinas Silica Brick Co.* [2474] distinguished (*per* Matthew, L.J.) on the ground that in that case "there was the special arrangement

come to that the applicant should be treated as a workman within the meaning of the Workmen's Compensation Act, 1897."

2479.—Hayden v. Dick (1902), 5 F. 150; 40 Sc. L. R. 95—Ct. of Sess.

H. and P., two labourers, agreed in writing with a quarrymaster to excavate the "tirr" or surface earth from a new part of the quarry at the rate of $7\frac{1}{2}d.$ per cubic yard. P. was then working at the quarry, but H. had not previously worked there. They were joined by a third man, on the footing that he should get an equal share of what they received for the work. The three did the work by their own manual labour, with the assistance of a man whom they engaged at fixed wages. The quarrymaster supplied the tools and plant, but exercised no control over the method of working, and the men were not tied down to hours. Payments on account were made by the quarrymaster to H. and P. (the receipts being signed by H.) practically weekly, the amount of the payment being calculated on a rough estimate of the work done. H. was killed while engaged in the work.

HELD (Lord Young *diss.*)—that he was not a "workman" within the meaning of the Act, but an independent contractor.

Notes.—*Per* the Lord Justice-Clerk: "The quarrymaster could not have dismissed him as a servant, and the deceased could not have given up the work by notice to leave service. If any question or dispute arose, it could only be dealt with as a question of breach of the contract to do the work, and not as a breach of a contract of service." *M'Gregor v. Dansken*, 1 F. 536 [2469], applied.

2480.—Paterson v. Lockhart (1905), 7 F. 954; 42 Sc. L. R. 755—Ct. of Sess.

An estate owner, through his factor, engaged a man to quarry from a quarry on the estate stone blocks for wire fences and farm buildings to meet estate requirements, in such quantities as the factor should direct. He was to be paid 5s. a day, though in fact he was not paid daily, and might employ assistants, to be paid through him, at the same rate. The estate forester visited the quarry and kept a note of the days on which the quarryman worked. The tools were supplied partly by the quarryman and partly by the estate. The quarryman was told where he was to work, but was free to choose the part of the quarry where the excavation was to be made. The quarryman having been injured by an explosion while engaged in his work, claimed compensation under the Act from the estate owner. The sheriff disallowed the claim on the ground that the claimant was a contractor and not a workman.

HELD—on a case stated, in which the only question was whether the claimant was a servant or workman within the meaning of the Act, that the claimant was a servant or workman.

Quære, whether a workman can at the same time be a contractor and a workman within the meaning of the Act.

Notes.—Lord M'Laren, in his judgment, said: "I also wish to reserve my opinion on the question in the case of *M'Gregor v. Dansken*

(1899), 1 F. 536 [2469], as to whether a man can be a workman and a contractor at the same time. There is much force in Lord Young's remarks on that point, but I desire to keep an open mind on the question."

2481.—Clarke v. Bailieborough Co-operative Agricultural and Dairy Society, Ltd. (1913), 47 Ir. L. T. R. 113; [1913] W. C. & I. Rep. 374—C. A. (Ir.).

A man who provided his own horse and cart entered into a contract with an agricultural and dairy society to cart milk to and from their creamery during a certain period, on such days and times as should be fixed by them, and for such service he was to be paid at the rate of one halfpenny per gallon. Having sustained an injury whilst engaged in carting the milk, he applied for compensation under the Workmen's Compensation Act.

HELD—that the relationship of master and servant existed, and that the applicant was entitled to compensation.

2482.—Moroney v. Sheehan (1903), 37 Ir. L. T. R. 166—C. A. (Ir.).

HELD—that a carter who found his own horse and cart and was engaged to carry hay from defendant's barn to defendant's steamer was a "workman" within the meaning of the Workmen's Compensation Act, 1897.

2483.—Curtis v. Plumtre (1913), 6 B. W. C. C. 87; [1913] W. C. & I. Rep. 195—C. A.

C., a tree-feller, was engaged by a bailiff to cut down certain trees. He asked that his son might help him, and also recommended another man, all of whom, with a further man, were engaged by the bailiff, and the whole gang worked under the directions of C. The tree-fellers were paid a lump sum for the job, which sum was distributed among the gang by arrangement among themselves. The men found some of the tools, the bailiff supplied others. On one occasion the bailiff instructed the men which way to let a tree fall, and after the accident he engaged two new men to take the place of C. The county court judge found that C. was not a workman, but an independent contractor.

HELD—that there was evidence to support the finding.

Notes.—**Doggett v. Waterloo Taxi-Cab Co.**, [1910] 2 K. B. 336 [2496]; **Smith v. General Motor Cab Co.**, [1911] A. C. 188 [2495], referred to.

2484.—Pears v. Gibbons (Nelson, third party), [1913] W. C. & I. Rep. 469; 6 B. W. C. C. 722—C. A.

A workman, who was a painter, died of blood poisoning, and his dependants recovered compensation from his last employer under s. 8, sub-s. 1 (iii.) (c), of the Workmen's Compensation Act, 1906. That employer sought to obtain contribution under s. 8, sub-s. 1 (iii.) (c) (iii.), from N., who had employed the workman during the

preceding twelve months, in the following circumstances : Prior to November, 1911, the workman was in partnership as a motor repairer, but on November 11th, 1911, he and his partner assigned all their property for the benefit of their creditors. N. was the trustee of the deed of assignment, and was given power to employ the workman "to assist him in winding-up the affairs of the debtors." N. in fact employed him for this purpose for thirteen weeks. N. said that he had exercised no control over the workman, who was allowed to do what he thought proper towards winding-up the business. N. also said that he was under no obligation to give the workman notice, if he had desired to terminate the employment, but that he should probably have thought it right to do so. He did not employ him as a painter, although apparently he had done some two days' painting during the employment.

HELD—that the county court judge was justified in finding that the relation between N. and the workman had not been that of employer and workman within the meaning of the Workmen's Compensation Act, 1906.

2485.—M'Cready v. Dunlop (1900), 2 F. 1027 ; 37 Sc. L. R. 779—Ct. of Sess.

A firm of shipbuilders entered into an arrangement with a squad of skilled workmen called "platers," under which the latter did certain work in connection with "frames," for which they were paid weekly by the hands of their leader a fixed sum per frame. This sum the squad, after paying the wages of certain helpers or unskilled workmen employed by them, divided among themselves. The squad were bound to work continuously during the working hours recognised in the yard, and when these were exceeded they were paid a certain sum per hour extra. Their work was done in the yard, and was supervised generally by the foreman of the shipbuilders. The necessary plant and materials were supplied by the shipbuilders. The squad were subject to printed rules and regulations "to be observed by the workmen in the employment of" the shipbuilders. One of the squad was accidentally killed while at work in the yard.

HELD—that the deceased was a workman in the employment of the shipbuilders as employers in the sense of the Act.

2486.—Jones v. Penwyllt Dinas Silica Brick Co., [1913] W. C. & I. Rep. 394 ; 6 B. W. C. C. 492—C. A.

A workman having been killed while working in a quarry, his widow claimed compensation from the company owning the quarry. It appeared that the deceased was paid by the company a fixed sum on each ton of stone sent out. He had taken another man into partnership and they had under them several men who were employed by the day. The company provided the necessary tools, trams, and rails, and also a horse. The deceased had to feed the horse and to buy gunpowder from the company for blasting purposes. When the company's manager required a particular kind of stone, he gave orders for it, and he could order the refuse or débris to be removed to any particular place. The manager said that if the deceased had

failed to do as instructed, he would have received reasonable notice to terminate the contract. Subject to this the deceased could work as he pleased provided he did not damage the quarry.

HELD—that there was evidence to support the finding of the county court judge that the deceased was a “workman” within the meaning of s. 13 of the Workmen's Compensation Act, 1906.

Notes.—*Per* Kennedy, L.J.: “The explanation given by Mathew, L.J., in *Vamplew v. Parkgate Iron and Steel Co.*, [1903] 1 K. B. 851, at p. 853 [2478], of the ground of the decision in *Evans v. Penwyllt Dinas Silica Brick Co.*, 18 T. L. R. 58 [2474], is incorrect.” *Taylor v. Burnham & Co.* (No. 2) [2475] and *Evans v. Penwyllt Dinas Silica Brick Co.* [2474] applied on the ground that the county court judge having “found as a fact that the applicant was a workman, . . . unless it could be made out that there was no evidence to support that finding the award must stand.”

(4) *Partners.*

2487.—*Ellis v. Joseph Ellis & Co.*, [1905] 1 K. B. 324; 74 L. J. K. B. 229; 92 L. T. 718; 53 W. R. 311; 21 T. L. R. 182—C. A.

It was arranged between three partners, who had entered into a partnership for the working of a mine, that if any of the partners should work in the mine he should be paid as an ordinary workman. One of the partners acted as working foreman, and was constantly engaged in manual labour in the mine, receiving in respect of his work weekly wages independently of anything he might be entitled to as a partner. While so employed he by accident received an injury which caused his death.

HELD—that, as he was a partner in the firm, the Workmen's Compensation Act, 1897, did not apply to him, and the firm were not liable to pay compensation in respect of his death.

Notes.—Collins, M.R., in referring to the effect of s. 1, sub-s. 1, of the Act of 1897, said: “That section appears to me clearly to contemplate a relation between two opposite parties, of whom one is employer and the other employee. It seems to me obvious, when the true position of the deceased is analysed, that he was not such a workman as is contemplated by the Act, and that a person cannot for the purposes of the Act occupy the position of being both employer and employee.” See also *Sharpe v. Carswell*, [1910] S. C. 391 [2413], and *Clark v. Jamieson*, [1909] S. C. 132 [2417].

(5) *Co-adventurers and Bailees.*

2488.—*Jones v. Owners of SS. Alice and Eliza* (1910), 3 B. W. C. C. 495—C. A.

The dependants of the master of a small vessel claimed compensation for his death. The man's widow said that he was the servant of the owners, and she produced books showing that he received two-thirds of the gross receipts, out of which he paid the ship's disbursements and expenses. The owners called no evidence as to the relationship between the master of the vessel and themselves.

HELD—that on these facts there was evidence to support the finding of the county court judge that a contract of service existed between the master and the owners.

Notes.—*Boon v. Quance* [2493] distinguished.

2489.—*Smith v. Horlock*, [1913] W. C. & I. Rep. 441 ; 6 B. W. C. C. 638—C. A.

The applicant was employed as the master of a barge on the terms that he was to receive half the net freights and to engage and pay the mate and boy, the owner only paying 5s. a week towards the boy's wages. It was a term of his employment that the owner was to fix the freight, and as regards the only voyage made by the applicant, the freight had actually been arranged before he was engaged. The applicant had no choice where to go, but received orders as to his destination and places of call. The applicant said he was not liable to dismissal during a voyage. In an account sent by the owner to the applicant, a deduction was made from the amount shown as due to the applicant in respect of his insurance under the National Insurance Act, 1911.

HELD—that the county court judge had not been justified in holding that the applicant was a co-adventurer and not a "workman" within s. 13 of the Workmen's Compensation Act, 1906, and that the case must be remitted to him to assess the compensation.

Notes.—*Boon v. Quance* [2493] distinguished. *Clark v. Jamieson* [2417] approved.

2490.—*Ship Victoria (Owners) v. Barlow* (1911), 45 Ir. L. T. 260 ; 5 B. W. C. C. 570—C. A. (Ir.).

A vessel was worked by shares. Tonnage and pilotage expenses were deducted from the gross freights, and the captain took two-thirds of the residue, paying thereout all other expenses. He made all contracts for freight, and engaged the crew. He took the vessel where he wished. There was evidence that, if the freight did not suffice to pay the wages of the crew, the owners paid them. The mate was drowned at sea. The county court judge found that he was a workman of the owners.

HELD—that there was evidence to support the finding.

2491.—*Cole v. Shrubsall and Wakeley Brothers, Ltd.* (1912), 5 B. W. C. C. 337 ; [1912] W. C. Rep. 226—C. A.

The master of a barge was engaged by the hirers of the barge and received half the net earnings of the barge, out of which he paid the mate. He injured his hand in a windlass, and received £1 a week compensation from the owner of the barge. He sought to register an agreement to pay compensation, and brought three separate proceedings, against the owner, against the hirers and against both the hirers and the owner. In each case the county court judge found there was no evidence of agreement and that the man was not a workman.

HELD—that there was evidence to support the finding.

Notes.—See also *Standing v. Eastwood*, 106 L. T. 477 [2220].

2492.—*Hoare v. Barge Cecil Rhodes (Owners)* (1911), 5 B. W. C. C. 49—C. A.

The mate of a coasting vessel, engaged for a voyage by telegram, was drowned. The only evidence as to the terms of his employment was a statement by the captain to the widow that he was to have 27*s.* for the freight. There was evidence that the boat was sailed on the share system, and that the mate's share for the trip would be about 27*s.* The deputy county court judge found that the mate was not a "workman" within the Act, but a co-adventurer.

HELD—there was evidence to support the award.

Notes.—*Per Cozens-Hardy, M.R.* : "The appellant here has no right whatever unless she can prove affirmatively that the relation of master and servant existed between the owners and Hoare."

2493.—*Boon v. Quance* (1909), 102 L. T. 443 ; 3 B. W. C. C. 106—C. A.

A vessel was sailed on the "thirds" or sharing system, under which the owner took one-third of the gross freights, the master taking the other two-thirds. The owner found the vessel and gear, and paid for repairs and oil for the lights. The master engaged what crew he pleased, victualled the vessel, and paid the crew and harbour dues, making what contracts he thought fit to take cargo to any place he pleased. The vessel went down with all hands, and certain dependants of the master claimed compensation under the Workmen's Compensation Act, 1906.

HELD—that there was no contract of service between the owner and master, and the dependants were not entitled to compensation.

2494.—*Hughes v. Postlethwaite* (1910), 4 B. W. C. C. 105—C. A.

A vessel was sailed under the "sharing system," the owner received one half of the gross receipts after deducting port charges, etc., and the captain received the remainder, out of which he paid the crew. The captain had power to trade wherever he pleased.

HELD—that there was no contract of service between the owner and the captain, and that the latter's widow was not entitled to compensation.

Notes.—*Boon v. Quance* [2493] followed.

2495.—*Smith v. General Motor Cab Co., Ltd.*, [1911] A. C. 188 ; 80 L. J. K. B. 839 ; 105 L. T. 113 ; 27 T. L. R. 370 ; 55 S. J. 439 ; 4 B. W. C. C. 249—H. L.

The findings of fact by a county court judge sitting as an arbitrator under the Workmen's Compensation Act, 1906, cannot be set aside if there was evidence to support the findings. The question whether there was evidence is a question of law.

The respondents let out a taxi-cab to the appellant, who was injured by an accident while he was driving the cab. Upon an application for compensation under the Act there was evidence that the relation of the respondents to the appellant was that of bailor and bailee of the taxi-cab, and the county court judge found as a fact that that was the true relation and that there was no contract of service.

HELD—that the finding could not be set aside, and that the appellant was not entitled to compensation.

Notes.—Lord Shaw of Dunfermline in his judgment said : “ I have only three propositions to state,—each in a sentence. In my opinion *quoad* the cab, the contract was an ordinary contract of *locatio rei*. *Quoad* the public, the relation of the cab-driver to the cab owner was, in my opinion, one of agency ; so that for negligence in the conduct of his business, both principal and agent might naturally be responsible to the public. *Quoad* the employer himself, the question whether the relation of master and servant existed between the employer and the driver is one of fact.” Lord Atkinson, in referring to the various cases cited in *Doggett v. Waterloo Taxi-Cab Co.* [2496], said : “ The general result of the cases . . . is that in the case of horse-drawn cabs, where drivers were given them in charge under terms resembling those admitted to exist in the present case, the relation between the proprietor and driver was that of bailor and bailee, but that *quoad* third parties the drivers were, under the provisions of the Metropolitan Hackney Carriage Act, 1843 (admittedly applicable to taxi-cabs), deemed to be the servants of the proprietors.”

2496.—*Doggett v. Waterloo Taxi-Cab Co.*, [1910] 2 K. B. 336 ; 79 L. J. K. B. 1085 ; 102 L. T. 874 ; 54 S. J. 541 ; 26 T. L. R. 491—C. A.

A taxi-cab driver, whilst in the yard of a taxi-cab company preparing to take out one of their cabs, was turning the handle to start the engine, when it back-fired ; one of his knuckles was cut, blood-poisoning followed, and he died some days afterwards. His widow claimed compensation against the company under the Workmen's Compensation Act, 1906, on the ground that he was a “ workman ” within the definition in s. 13. According to the practice in the yard, each time a driver obtained a cab he signed a printed form of declaration that he had taken out the particular cab in good condition with full kit of tools, tariff, and police plates properly affixed and with his badge and licence, and that he would be personally responsible for any violation of the police regulations. Underneath the declaration there was a space in which a summary of the total takings as registered by the cab's taximeter was entered by a clerk of the company when the cab came in. Three-fourths of such takings were paid by the driver to the company, and the other fourth was retained by him, he paying the company thereout for the petrol used by him. He did not receive any wages from the company. A driver on leaving the yard could take the cab where he pleased, and might keep it out until the next day or for several days. The only control the company had

over the drivers was that they might refuse to let a driver have a cab the next time he applied for one.

HELD (on these facts)—that there was no contract of service between the deceased and the company, and that the relation was not that of master and servant, but of bailor and bailee or possibly of co-adventurers, and that consequently the widow was not entitled to compensation.

Notes.—*Rex v. Solomons*, [1909] 2 K. B. 980, distinguished. *Fowler v. Lock*, 7 C. P. 272; *Venables v. Smith*, 2 Q. B. D. 279; *King v. London Improved Cab Co.*, 23 Q. B. D. 281; *Keen v. Henry*, [1894] 1 Q. B. 292; *Gates v. Bill*, [1902] 2 K. B. 38, referred to.

(6) *Religious and Charitable Institutions.*

2497.—*Burns v. Manchester and Salford Wesleyan Mission* (1908), 99 L. T. 579—C. A.

The respondents were a charitable organisation carrying on philanthropic work. They instituted a labour yard, and in return for work done therein by persons out of employment who applied to them for relief they provided such persons with board and lodging. The applicant having so applied for relief, work was given to him to perform in the respondents' labour yard, and during such occupation he met with an accident which caused personal injury to him, for which he claimed compensation under the Workmen's Compensation Act, 1906.

HELD (without deciding the question whether the respondents carried on a "trade or business" within the meaning of s. 13 of the Act)—that the applicant had not established that there was any "contract of service" between him and the respondents within the meaning of that section.

2498.—*Tozeland v. Guardians of the Poor of the West Ham Union*, [1907] 1 K. B. 920; 76 L. J. K. B. 514; 96 L. T. 519; 23 T. L. R. 325—C. A.

The employment of a pauper set to work by the guardians of the poor, under the powers given to them by the Poor Law Acts and Orders, is not contractual but statutory, and therefore the defence of common employment is no answer to an action by a pauper so employed against the guardians to recover damages for injury suffered in such employment through the negligence of an officer of the guardians. But the setting of the paupers to work is part of the administrative duties imposed on the guardians by statute, and an action by the pauper against the guardians for negligence of their officer in the discharge of these duties will not lie.

Notes.—This case, although not a decision under the Workmen's Compensation Acts, has been included to contrast with the cases which follow.

2499.—*Porton v. Central (Unemployed) Body for London*, [1909] 1 K. B. 173 ; 78 L. J. K. B. 139 ; 100 L. T. 102 ; 73 J. P. 43 ; 25 T. L. R. 102—C. A.

The Central (Unemployed) Body for London constituted by the Unemployed Workmen Act, 1905, are in the position of employers within the meaning of the Workmen's Compensation Act, 1906, towards the unemployed persons for whom they provide temporary work under a contract of service.

2500.—*Gilroy v. Mackie*, [1909] S. C. 466 ; 46 Sc. L. R. 325—Ct. of Sess.

A man employed on temporary work by a distress committee under the Unemployed Workmen Act, 1905, was injured by accident arising out of and in the course of the employment.

HELD—that he was a workman in the employment of the distress committee within the meaning of the Workmen's Compensation Act, 1906, and was entitled to compensation under that Act.

HELD FURTHER—where a workman was injured whilst in the employment of a distress committee under the Unemployed Workmen Act, 1905, and was paid during incapacity poor relief at the rate of 10s. per week, that the amount of such poor relief was not to be taken into account in calculating under Schedule I., s. 3, the amount of the compensation payable by the distress committee.

Notes.—*Porton v. Central (Unemployed) Body for London* [2499] followed.

2501.—*MacGillivray v. Northern Counties Institute for the Blind*, [1911] S. C. 897 ; 48 Sc. L. R. 811 ; 4 B. W. C. C. 429—Ct. of Sess.

A blind man was injured while employed in the industrial department of an institute for the blind. This department was supported partly by charitable contributions received by the institute. The institute gave the man, in respect of his services, board, lodging, and 5s. a month, and received on his account charitable and parochial assistance which came to a few pounds less than the amount it expended on him.

HELD—(1) that the man was a workman within the meaning of the Workmen's Compensation Act, 1906 ; and (2) that as the monthly payments to such blind persons were supposed, in the institution, to represent 20 per cent. of their average earnings, the compensation fell to be calculated on that basis.

Notes.—*Per* the Lord President : “ I am of opinion that the case follows that of *Gilroy v. Mackie*, [1909] S. C. 466 [2500], decided in this division. I think, applying to this case the criteria that we applied there, that there is no doubt that this man was a workman. He was employed under a contract of service. He was not bound to go to the institute, and the institute was not bound to receive him. He stipulated that he would give his services for what they were

worth to the institute, and they in return stipulated that they would give him board, lodging, and clothing, and 5s. a month in money."

2502.—In re Employment of Church of England Curates, [1912] 2 Ch. 563 ; 82 L. J. Ch. 8 ; 28 T. L. R. 579—Parker, J.

The position of a curate in the Church of England, whether he is formally licensed by the bishop under seal or is a mere probationer under the bishop's temporary permission, is that of a person who holds an ecclesiastical office, and not the position of a person whose duties and rights are defined by contract. Therefore, the relation between the incumbent and the curate, or the bishop and the curate, is not the relation of employer and employed, and the curate is not compulsorily insurable under the National Insurance Act, 1911.

Notes.—This is a decision under the National Insurance Act, 1911, but it is submitted that a curate, for the reasons above stated, is not a "workman" within the meaning of the Workmen's Compensation Act.

2503.—In re Employment of Ministers of the United Methodist Church ; In re Employment of Ministers (under probation) of the Wesleyan Methodist Church, [1912] W. N. 206 ; 107 L. T. 143 ; 28 T. L. R. 539 ; 56 S. J. 687—Joyce, J.

Ministers of the United Methodist Church, and ministers (under probation) of the Wesleyan Methodist Church, are not under a "contract of service," within the meaning of the National Insurance Act, 1911.

Notes.—See note to *In re Employment of Church of England Curates* [2502].

2504.—Scottish Insurance Commissioners v. Royal Infirmary of Edinburgh (1913), 50 Sc. L. R. 495 ; [1913] W. C. & I. Rep. 383—Ct. of Sess.

The resident and non-resident medical and surgical staff, and the supervisors of the administration of anæsthetics in a public infirmary, are not under a "contract of service" within the meaning of the National Insurance Act, 1911.

Notes.—The test laid down by Fletcher Moulton, L.J., in *Simmons v. Heath Laundry Co.* [2463], that there must be a "contract of service" and not merely "a contract for services," applied. *Walker v. Crystal Palace Football Club* [2468], distinguished. *Hillyer v. Governors of St. Bartholomew's Hospital*, [1909] 2 K. B. 820, referred to. See also note to *In re Employment of Church of England Curates* [2502].

DEFINITIONS—*cont.*

C. "Dependants."

THE various questions which arise under this heading will be considered under the following scheme of arrangement.

Firstly, dependency is a question of fact. We consider *Main Colliery v. Davies* [2505] to be the leading case on this point. Lord Halsbury's judgment in this case seems to have been misunderstood in subsequent decisions in the Court of Appeal which are based upon the presumption of a legal obligation to maintain the dependant (*Senior v. Fountains* [2511]; *Toole v. Ship Isle of Erin* [2512]). These decisions were overruled by the House of Lords in *Hodgson v. West Stanley Colliery* [2506], as departing from the principle laid down in *Main Colliery v. Davies* (see also *Moyes v. Dixon* [2507]; *Marsh v. Boden* [2508]; *Rintoul v. Dalmeny Oil Co.* [2509]; *Devlin v. Pelaw Main Collieries* [2510]). Partial dependency is also a question of fact; thus where a father claimed compensation in respect of the death of his son, the county court judge is entitled to deduct from the earnings of the deceased the cost of his maintenance (*Tamworth Colliery v. Hall* [2513]; see also *Leggett v. Burke* [2514] and *Arrol v. Kelly* [2515]). The mere obligation to maintain anyone does not necessarily constitute dependency (*Rees v. Penrikyber Navigation Colliery* [2516]; *Trainer v. Addie* [2517]). The standard of living in a particular neighbourhood is to be disregarded (*Howells v. Vivian* [2518]; *French v. Underwood* [2519]). The decision in *Simmons v. White* [2520], in so far as it conflicts with *Main Colliery v. Davies* on this point, must be taken to be overruled.

Secondly, the position of husband and wife. The question of dependency in all cases is a question of fact, and thus there is no presumption of law that a wife is dependent upon her husband's earnings merely because of his legal obligation to maintain her (*New Monckton Colliery v. Keeling* [2521]). It follows from this case that the decisions in the following cases, in so far as they were based on the presumption of a wife's dependency, are no longer law (*Williams v. Ocean Coal Co.* [2530]; *Coulthard v. Consett Iron Co.* [2531]; *Stanland v. North Eastern Railway* [2532]; *Kelly v. Hopkins* [2533]; *Queen v. Clarke* [2534]). In Scotland the presumption of a wife's dependency has never been adopted (*Turners v. Whitefield* [2525]); although in *Sneddon v. Addie* [2529] and *Cunningham v. M'Gregor* [2528] there are certain passages in the judgments which show a tendency to adopt the presumption, but these were strongly criticised in the subsequent decisions of *Lindsay v. M'Glashan* [2526] and *Baird v. Birsztan* [2527]. Although it is finally settled that there is no presumption of dependency in the case of a wife, it does not follow that the husband's legal obligation to maintain her must be disregarded (*New Monckton Collieries v. Keeling* [2521]). Thus if a

husband deserts his wife and children, his obligation to maintain them will remain unless it appears that they have abandoned their right to maintenance (*Potts or Young v. Niddrie and Benhar Coal Co.* [2522]); see also *Smith v. Cope* [2523] and *Polled v. Great Northern Railway* (No. 2) [2524]).

Thirdly, the position of parent and child. The rule laid down in *New Monckton Collieries v. Keeling* applies also to infant children, and there is thus no presumption of dependency (*Lee v. Owners of Ship Bessie* [2535]). But even where a father has deserted his children before his death, they may still be held to be partially dependent upon him if there is a reasonable probability that had he lived he would in the future have supported them (*Dobbie v. Egypt and Levant Steamship Co.* [2536]). For the position of a grandchild, see *Cooper v. Fife Coal Co.* [2537]. The same considerations apply in the case of illegitimate children, the question of dependency being purely one of fact (*Briggs v. Mitchell* [2538]; *McLean v. Moss Bay Hematite Iron Co.* [2539]; *Bowhill Coal Co. v. Neish* [2540]; see also *Wallace v. Fife Coal Co.* [2541]). It is the duty of the arbitrator in determining the question of dependency to decide incidentally the relationship of the claimant to the deceased (*Johnstone v. Spencer* [2542]). A posthumous illegitimate child is entitled to claim as a dependant (*Orrell Colliery v. Schofield* [2543]). The rules concerning the admissibility of evidence as to the paternity of the child and of statements made by the deceased showing his intention to marry the mother were stated at length in *Ward v. Pitt* [2544].

Fourthly, alien dependants. An alien dependant is entitled to compensation (*Krzus v. Crow's Nest Pass Coal Co.* [2545]; *Baird v. Birsztan* [2527]).

Fifthly, the applicant must be dependent upon the workman at the time of his death. When considering the question of dependency, the only time at which to draw the line is the time of the workman's death, and sources of income which may arise after that date cannot be taken into consideration (*Pryce v. Penrikyber Navigation Colliery Co.* [2546]). But there may be dependency, although at the actual time of death no money was being received. Thus the fact that the deceased at the time of his death was not sending money home, although he had done so on previous occasions, will not be sufficient to upset a finding of fact that the applicant was a dependant (*Robertson v. Hall* [2547]; *Turner v. Miller and Richards* [2548]). See also *Wainwright v. Crichton* [2549].

Sixthly, the devolution of money upon the death of the dependant. In *United Collieries v. Simpson or Hendry* [2550] it was held that if the dependant dies without making a claim his right to compensation vests in his legal personal representative, approving on this point *Darlington v. Roscoe* [2551], and disapproving *In re O'Donovan and Cameron, Swan & Co.* [2552].

Seventhly, the apportionment of compensation money. When compensation is awarded to the dependants of a deceased workman, the arbitrator must make a definite allotment to each dependant who is not *sui juris* (*Manchester v. Carlton Iron Co.* [2553]; but see *Skipper v. Nicholson* [2554]). It is for the county court judge to find the quantum of compensation (*Cheverton v. Oceanic Steam Navigation Co.* (No. 2) [2555]).

The cases are divided as follows :—

I. Fact not Law.

- (1) General Principles.
- (2) Partial Dependency a Question of Fact.
- (3) Obligation to Maintain does not constitute Dependency.
- (4) Standard of Living not to be Regarded.

II. Husband and Wife.

III. Parent and Child.

- (1) General Principles.
- (2) Illegitimate Child.
- (3) Posthumous Child.

IV. Alien Dependant.

V. Dependent at time of Workman's Death.

VI. Devolution of Compensation Money.

VII. Apportionment of Compensation Money.

I. *Fact not Law.*(1) *General Principles.*

2505.—**Main Colliery Co., Ltd. v. Davies**, [1900] A. C. 358 ; 69 L. J. Q. B. 755 ; 83 L. T. 83 ; 65 J. P. 20 ; 16 T. L. R. 460—H. L. (E.).

The question whether the members of a workman's family who has been killed by an accident were "wholly or in part dependent" upon the workman's earnings at the time of his death is one of evidence for the arbitrator, whose award will not be disturbed in respect of amount, if the court is satisfied that there was such evidence. The actual income of the person killed and the actual expenditure of the family are the basis for decisions in each case, and no general standard can be applied.

The respondent's son, who was killed by an accident, had been earning at the time of his death 8s. a week on an average of one hundred and fifteen weeks. His earnings went into the family fund, which was administered for the common benefit. The county court judge, whose decision was affirmed by the Court of Appeal, found that the father was partly dependent upon the son's earnings, and made an award in his favour.

Per the Earl of Halsbury, L.C. "The sole question before us is whether there was any amount of dependency at all giving a right to anything. If there was, of course this appeal must be dismissed. Now, my Lords, as to that question, I do not think the Legislature ever intended that there should be any sharp definite line drawn, but that in each case the question must turn upon whether there is or is not what the Legislature has described as a condition of dependency as being the test whether or not a person is entitled to any compensation by reason of a death.

"Now, what is dependency? The notion that a person has a legal obligation upon him to keep his whole family when he earns a considerable part of what is required himself, and when the other members of the family only contribute a small part, appears to me to account for the Legislature having introduced not only dependency, but partial dependency. Was there, or was there not partial dependency in this case—that is to say, was there evidence upon which the county court judge might have come to the conclusion that there was? For my own part, I cannot in the least doubt that there was. The whole family were all dependent upon the wages. Whose wages? Partly this boy's wages. It is said that this boy was under no obligation to support his brothers and sisters. No one denies that, but it appears to be forgotten that the obligation is upon the head of the family. He is by law bound to support his family, and he would be punished by law if he did not support them. Therefore, the burden being upon the father of the family, the father of the family in his turn obtains from the wages of those who are being

maintained by him a partial contribution to the general family fund. Why is not the father in the discharge of that burden partly dependent upon the earnings which he receives from his children? I am not able to answer that question. It appears to me that he must be relying or dependent—call it what you please—for the means by which he discharges his legal obligation upon the funds supplied to him, or partly supplied to him, by the children who earn those funds.

“My Lords, if that is true, it appears to me that there was evidence by which the county court judge was guided, and was properly guided, in this case. If it is true that there was in this case a sum of 8s. a week, contributed by this boy to the common family fund, it appears to me to be perfectly clear that the father was to some extent ‘dependent’ upon that son’s earnings—that is to say, he was partially dependent upon the earnings of the son for contributions for the maintenance of the family; and, therefore, for discharging the legal obligation which he was under he was dependent upon the sum so supplied by his son. My Lords, I am unable to see that there is anything in this case beyond a mere question of fact. I decline to assume that the Legislature has contemplated a particular ‘standard.’ I am not quite certain what it means, but I am quite certain that no human intellect would be able to ascertain exactly what the standard was if one had to deal with such a question—a standard dependent upon what the ordinary course of expenditure in the neighbourhood, and in the class in which the man lived. To my mind that is a problem so extremely obscure that I cannot believe that the Legislature intended it to be solved. What the family was in fact earning, what the family was in fact spending, for the purpose of its maintenance as a family seems to me to be the only thing which the county court judge could properly regard, and, that being the thing which the county court judge ought to regard, I think in this case he has regarded it, and accordingly it appears to me that the question of fact, and only the question of fact, was one which the county court judge has properly answered.”

Notes.—This decision of the House of Lords is of great importance since it established the principle that dependency is a question of fact. Lord Halsbury’s judgment appears to have been misunderstood by the Court of Appeal in subsequent cases which lay down that there is a presumption of the dependency of a wife upon her husband, but these cases were overruled by *Hodgson v. Owners of West Stanley Colliery* [1910] A. C. 229 [2506], which followed *Davies’ Case*. Lord Atkinson in *New Monckton Collieries v. Keeling*, [1911] A. C., at p. 653 [2521], adopts the following passage from the judgment of Lord Halsbury in this case ([1900] A. C., at p. 362): “What the family was in fact earning, what the family was, in fact, spending, for the purpose of its maintenance as a family, seems to me to be the only thing which the county court judge could properly regard.” Lord Shand in this case concurs in the observations made by Collins and Romer, L.JJ., in *Simmons v. White*, [1899] 1 Q. B. 1007 [2520], and says “dependent probably means dependent for the ordinary necessities of life, or for maintenance of himself and his family, for a person of that class and position in life.” See the notes to *Hodgson v. West Stanley Colliery Co.* [2506] and *New Monckton Collieries v. Keeling* [2521].

2506.—*Hodgson v. Owners of West Stanley Colliery*, [1910] A. C. 229 ; 79 L. J. K. B. 356 ; 102 L. T. 194 ; 26 T. L. R. 333 ; 54 S. J. 403 ; 3 B. W. C. C. 260, 392 ; 47 Sc. L. R. 881—H. L.

A father and two sons were employed at the same colliery. The sons lived with their parents, to whom they gave all their earnings, and those earnings, together with the father's, formed one common fund out of which the whole household was maintained. By an accident at the colliery, the father and both sons were killed. The widow, on behalf of herself and the younger children, claimed compensation under the Workmen's Compensation Act, 1906, in respect of the death of the father and the two sons.

HELD—that the applicants were dependent on each and all of the three deceased workmen, and were entitled to compensation on that footing.

Notes.—Prior to this decision of the House of Lords, it had been decided in the Court of Appeal (Buckley, L.J., *diss.*) in *McLean v. Moss Bay Iron and Steel Co.*, [1909] 2 K. B. 521 [2539], following on this point *Senior v. Fountains*, [1907] 2 K. B. 563 [2511], that where a wife and husband are living together with other members of the family, the wife cannot claim as distinct from the husband to be dependent upon the earnings of a member of the family whose wages have gone to increase the common fund, and have not been in any way appropriated to the benefit of the mother as distinct from her husband. It is clear from the decision of the House of Lords in the above case that this proposition is unsound. *Per* Lord Loreburn, L.C. ([1910] A. C., at pp. 231—233): “It was argued that the mother was, in the eye of the law, wholly dependent upon her deceased husband, and being so, could not possibly be in any degree dependent upon her two deceased sons ; for that would involve a logical contradiction. . . . In this argument I am told that I am by law required to affirm something as the truth which everyone knows to be entirely false. The short answer is that the law requires no such thing. There are such things as legal fictions which have a peculiar history of their own, but this is not one of them. The mother was not, in law, wholly dependent on her deceased husband. She and her family were dependent upon those who supplied them with the means of subsistence, namely, in the present case, her husband and each of her two deceased sons. . . . It is for the arbitrator or county court judge to ascertain, purely as a question of fact, who are dependent, and to what extent, and what they are to receive, and how the compensation is to be distributed among the dependants, if there be more than one, in accordance with the directions of the Act. There is no room that I can see for legal presumptions.” *Main Colliery Co. v. Davies* [2505] applied. Decision of the Court of Appeal in *McLean v. Moss Bay Co.* [2539] ; *Senior v. Fountains* [2511], overruled. *Simmons v. White* [2520] ; *Bevan v. Crawshay* [2590] ; *Howells v. Vivian* [2518] ; *Turners v. Whitefield* [2525] ; *Pryce v. Penrikyber Co.* [2546] ; *Reg. v. Clarke* [2534], cited. Reference should be made to the notes to the following cases : *New Monkton Collieries v. Keeling* [2521] ; *Williams v. Ocean Coal Co.* [2530] and *Coulthard v. Consett Iron Co.* [2531].

2507.—Moyes v. Dixon (1905), 7 F. 386; 42 Sc. L. R. 319—Ct. of Sess.

A workman's daughter, who had previously been earning wages, remained at home after her mother's death to keep her father's house, getting from him board, lodging, and clothing, but no wages. The workman was killed by accident in the course of his employment.

HELD—that the daughter was a dependant of the workman within the meaning of the Act.

Notes.—*Main Colliery Co. v. Davies* [2505] referred to.

2508.—Marsh v. Boden (1905), 7 W. C. C. C. 110—C. A.

The applicant, who was thirty-nine years of age, was the only daughter of the deceased, and had lived with him until his death. He earned 18s. a week, which he gave to the applicant. There was a lodger, who paid the applicant 16s. a week, out of which 4s. or 5s. was profit. He stayed on after the father's death.

HELD—that the applicant was wholly dependent on the earnings of the deceased, as the lodger was the lodger of the father and not of the daughter, because he was tenant of the house and owned the furniture.

2509.—Rintoul v. Dalmeny Oil Co., [1908] S. C. 1025; 45 Sc. L. R. 809—Ct. of Sess.

A widow, who had five sons, working miners, four of whom were married and had children, lived with and was entirely supported by her unmarried son. In a claim at her instance for compensation in respect of the death of the son who supported her :

HELD—that, notwithstanding her right to relief from the four other sons, who were able to contribute to her support, she was wholly dependent upon the earnings of the deceased at the time of his death within the meaning of the Workmen's Compensation Act, 1906.

Notes.—Lord McLaren in his judgment said: "Given the relationship, then I think the inquiry must always be, did the deceased in fact maintain his mother or child, or whoever the person may be, who is making the claim, and if he did so, I think it is irrelevant to consider whether there are others against whom a claim might have been made upon the same ground of relationship."

2510.—Devlin v. Pelaw Main Collieries (1912), 5 B. W. C. C. 349; [1912] W. C. Rep. 225—C. A.

A collier deserted his wife, and made no provision for her, so that she had to go to the workhouse. Seven years afterwards he was killed at a colliery. He had only made her two payments during the seven years, totalling 9s. 6d. The county court judge found the widow was not a dependant.

HELD—that there was evidence to support the finding.

N.B.—The following cases are overruled by *Hodgson v. Owners of West Stanley Colliery* [2506].

2511.—Senior v. Fountains and Burnley, [1907] 2 K. B. 563; 76 L. J. K. B. 928; 97 L. T. 562; 23 T. L. R. 634; 51 S. J. 590—C. A.

A workman who met with a fatal accident in the course of his employment, in addition to his own earnings, was at the date of his death receiving the wages of his three elder sons, whom he housed, fed, and clothed in return, making a balance of gain in so doing.

HELD—that the widow and younger children were none the less “wholly dependent” on the workman’s earnings within the meaning of the Workmen’s Compensation Act, 1887, Sched. I. (1) (a) (i).

2512.—Toole v. Ship Isle of Erin (Owners), 3 B. W. C. C. 110—C. A.

The applicant, who lived with her husband in his house, claimed compensation as being partially dependent upon her brother, a seaman, who, when at home, boarded and lodged with the applicant, his sister, paying her money for that purpose.

HELD—that the applicant could not be partially dependent on the brother, as she was wholly dependent on her husband with whom she lived.

Notes.—*Williams v. Ocean Coal Co.* [2530] and decision of the Court of Appeal in *M’Lean v. Moss Bay Hematite Iron and Steel Co., Ltd.*, [1909] 2 K. B. 521 [2539], applied.

(2) *Partial Dependency a Question of Fact.*

2513.—Tamworth Colliery Co., Ltd. v. Hall, [1911] A. C. 665; 105 L. T. 449; 55 S. J. 615; 4 B. W. C. C. 313—H. L.

The question how far a member of the family of a deceased workman was dependent on his earnings within the meaning of the Workmen’s Compensation Act, 1906, is a question of fact to be determined by the county court judge upon a consideration of all the circumstances of the case.

A workman, a boy of fourteen years of age, was killed by an accident. His wages were 6s. 11d. a week. These wages were paid to the father and helped to maintain the family. The father worked at a colliery and supplemented his wages by carrying on the trade of a barber on certain evenings and a part of Saturday. The deceased assisted his father in this trade, and the latter estimated the value of his services at 6s. a week. The county court judge held that the applicant was not a dependant or partial dependant, as 6s. 11d. a week was not more than sufficient to maintain the boy.

HELD—that the case must go back to the county court judge, as he was not precluded from finding the father to be a dependant, if the voluntary services which the son rendered reduced the cost of the boy’s keep so that, in fact, all or part of the payments he made to the family fund were available for the family support.

Notes.—*Main Colliery Co. v. Davies* [2505] explained by Lord Loreburn, L.C., who said: “The authority in question, namely,

Main Colliery Co. v. Davies, was apparently regarded as though it decided that a father must be dependent upon his son in certain circumstances. That case only decided that a parent may be dependent upon his son's earnings." *Osmond v. Campbell and Harrison, Ltd.* [2587], if and so far as it holds that, upon a question of partial dependency, the county court judge is not entitled to deduct from the earnings of the deceased the cost of his maintenance, overruled.

2514.—*Leggett & Sons v. Burke* (1902), 4 F. 693; 39 Sc. L. R. 448—Ct. of Sess.

In an arbitration under the Act the sheriff found a father entitled to compensation for the death of his only son, on the ground that the father was in part dependent on the earnings of the son. The son's employers appealed on the ground that the father was dependent on the son only because the father supported a cripple brother who lived with him and his son. The court affirmed the judgment of the sheriff, holding that there was nothing in the case for appeal to show that the sheriff had committed an error in law.

Notes.—*Simmons v. White* [2520] and *Main Colliery Co. v. Davies* [2505] referred to.

2515.—*Arrol & Co., Ltd. v. Kelly* (1905), 7 F. 906; 42 Sc. L. R. 695—Ct. of Sess.

A father claimed compensation in respect of the death of his son, who died from injuries sustained in the course of his employment. The son's average weekly earnings from his employment were £1 4s. 1d., but he also practised a systematic course of betting which brought him a substantial profit. The father, who was a widower, fifty-four years of age, and without dependants, suffered from bronchitis and rheumatism, and his capacity for work was consequently precarious, but his average weekly earnings during a period of forty weeks were £1 4s. 11d. The son made payments to his father which averaged 10s. per week. Father and son did not live together.

HELD—that the father was not in part dependent upon the earnings of his son within the meaning of the Act.

Notes.—*Leggett & Sons v. Burke* [2514] distinguished. *Howell v. Vivian* [2518] cited.

(3) *Obligation to Maintain does not constitute Dependency.*

2516.—*Rees v. Penrikyber Navigation Colliery Co.*, [1903] 1 K. B. 259; 72 L. J. K. B. 85; 87 L. T. 661; 51 W. R. 247; 67 J. P. 231; 1 L. G. R. 173; 19 T. L. R. 113—C. A.

The meaning of the words "dependent upon the earnings of the workman at the time of his death," in s. 7, sub-s. 2, of the Workmen's Compensation Act, 1897, is confined to actual dependence in fact upon the earnings of the workman. Consequently, the father of a workman who at the time of the death of the workman was being maintained in a workhouse, at the sole expense of guardians of the poor, is not within the meaning of the words.

Notes.—*Main Colliery Co. v. Davies* [2505] followed. See notes to *New Monckton Collieries, Ltd. v. Keeling* [2521] and *Hodgson v. Owners of West Stanley Colliery* [2506].

2517.—*Trainer v. Addie & Sons Collieries, Ltd.* (1904), 42 Sc. L. R. 85; 7 F. 115—Ct. of Sess.

In a claim by a widow for compensation for the death of her son, it was proved that the applicant was, at the date of the death, undergoing a sentence of confinement in a state reformatory for inebriates, that during the preceding four years she had been in prison with the exception of ten months, and that during that period she had occasionally earned a little by outdoor work, but was otherwise entirely dependent upon her son, who had contributed 5s. to 6s. a week towards her support.

HELD—that she was not wholly or partially dependent on her son's earnings at the time of his death.

Notes.—*Cunningham v. Macgregor & Co.* [2528]; *Sneddon v. Robert Addie & Sons Collieries* [2529] distinguished. *Rees v. Penrikyber Navigation Colliery Co.* [2516] referred to.

(4) *Standard of Living not to be Regarded.*

N.B.—See *Main Colliery Co. v. Davies* [2505].

2518.—*Howells v. Vivian* (1902), 85 L. T. 529; 50 W. R. 163; 18 T. L. R. 36—C. A.

The plaintiff claimed compensation, under the Workmen's Compensation Act, 1897, as being in part dependent upon the earnings of his deceased son, who was killed by accident in the employment of the defendants. The county court judge held that the plaintiff was not dependent upon the earnings of his son, and was not entitled to compensation because he was able to maintain himself and his family in his position of life without the assistance of the earnings of his son.

HELD—that the county court judge was wrong in holding that the plaintiff was not a dependant because he was able to maintain himself and his family without the assistance of his son's earnings.

Notes.—*Main Colliery Co. v. Davies* [2505] followed. The Master of the Rolls (in 85 L. T., at p. 530) adopted the language of Lord Davey in that case where he says: "I think it is clear that as the boy did give his parents his wages, and the parents did receive and depend on the son's wages as part of their income or means of living, the question is answered."

2519.—*French v. Underwood* (1903), 19 T. L. R. 416—C. A.

In determining whether a person is a "dependant" within the meaning of the Workmen's Compensation Act, 1897, the county court judge ought not to take into consideration the standard of living in the neighbourhood, namely, that the sums which the various

members of the family were earning, apart from the deceased workman's contribution to the fund, were sufficient for their maintenance.

Notes.—*Main Colliery Co. v. Davies* [2505] applied.

2520.—*Simmons v. White*, [1899] 1 Q. B. 1005 ; 68 L. J. Q. B. 507 ; 80 L. T. 344 ; 47 W. R. 513 ; 15 T. L. R. 263—C. A.

A workman having by accident arising out of and in the course of his employment sustained injury resulting in death, his parents, with whom he resided, and to whom he gave his wages, claimed compensation under the Workmen's Compensation Act, 1897. At the hearing of the claim the father, who was thirty-four years of age and in receipt of full wages, stated that the earnings of the workman were a help to maintain his family. The county court judge having found that the parents were in part dependent upon the earnings of the workman within the meaning of s. 7, sub-s. 2, of the Act:

HELD—that the words “dependent upon the earnings” in that sub-section meant dependent thereon in the proper sense of the term for the ordinary necessities of life, having regard to the class and position of the parties ; and that, as it appeared that the county court judge had adopted this construction, the court could not interfere with his finding upon the question of fact whether the parents were so dependent.

Notes.—The standard adopted by the Court of Appeal in this case has been in effect abrogated by Lord Halsbury in his judgment in *Main Colliery Co. v. Davies*, [1900] A. C. 358 [2505], where he says (at p. 362): “I decline to assume that the Legislature has contemplated a particular ‘standard.’ I am quite certain that no human intellect would be able to ascertain exactly what the standard was if one had to deal with such a question . . . a standard dependent upon what was the ordinary course of expenditure in the neighbourhood, and in the class in which the man lived.”

II. *Husband and Wife.*

2521.—*New Monekton Collieries, Ltd. v. Keeling*, [1911] A. C. 648 ; 80 L. J. K. B. 1205 ; 105 L. T. 337 ; 27 T. L. R. 551 ; 55 S. J. 687 ; 4 B. W. C. C. 332—H. L.

The applicant, who was married in 1881, left her husband in 1888 on account of his cruelty, and had never since lived with him. There was no agreement for separation ; the applicant never made any application for maintenance against her husband, who never in fact paid the applicant anything for her own or her children's support, and she supported herself by her own exertions. In 1910 the husband met with a fatal accident while employed by the respondent's collieries. In a claim by the applicant for compensation under the Workmen's Compensation Act, 1906, in respect of her husband's death :

HELD—that the applicant was not dependent upon her husband and that the county court judge was wrong in making an award of compensation in her favour.

There is no presumption of law that a wife is dependent upon her husband's earnings merely because of his legal obligation to maintain her, but the existence of this obligation, the probability that it will be discharged, either voluntarily or under compulsion, and the probability that the wife will ever enforce her right if the obligation be not discharged voluntarily are all matters proper to be considered by the arbitrator in determining the question of fact whether or not the wife, at the time of her husband's injury, looked to his earnings for her maintenance and support in whole or in part.

Notes.—This decision of the House of Lords, reversing the decision of the Court of Appeal, [1911] 1 K. B. 250, followed the principle laid down in *Hodgson v. West Stanley Colliery Co.*, [1910] A. C. 229 [2506], and *Main Colliery Co. v. Davies*, [1900] A. C. 358 [2505], that dependency is a question of fact. Since the decision in this case, it is clear that the decisions in *Coulthard's Case* [2531]; *Stanland's Case* [2532]; and *Williams v. Ocean Coal Co.* [2530], in so far as they lay down that there is a presumption in favour of the dependency of a wife, are no longer law, being overruled by *Hodgson's Case*. They are, however, in the opinion of Lord Robson, still of some value, and rightly decided upon the facts. His judgment seems to be in conflict with the other judgments in the House of Lords on this point, and should be carefully compared with them. See on this point the notes to *Hodgson's Case* [2506], and *Williams v. Ocean Coal Co.* [2530]. Lord Shaw (in [1911] A. C., at p. 660) adopts the language of the Lord President in *Baird & Co. v. Birsztan* [2527]. "In a proper sense," says his Lordship, "it is not a presumption at all either of fact or of law" . . . "but it is an inference of fact drawn from the experience of ordinary life that, if you know nothing about a wife except that she is simply the wife of a husband—more especially in the class with which we are here dealing—the woman is dependent on her husband, because men's wives in such a class are, as a matter of fact, usually dependent on their husbands." Lord Shaw referred to the following other Scotch cases: *Turners v. Whitefield* [2525]; *Lindsay's Case* [2526], and *Briggs v. Mitchell* [2538], and said that in his opinion the Scotch decisions are in entire accord with the views set forth in the cases of *Main Colliery Co. v. Davies* [2505], and *Hodgson v. West Stanley Colliery* [2506]. His Lordship pointed out that the passage in Lord Young's judgment in *Cunningham v. McGregor* [2528], where he referred to "the legal presumption that a wife is wholly dependent on her husband," had been expressly repudiated by the Lord President in *Baird & Co. v. Birsztan* [2527], as it was considered in Scotland as of an unsettling tendency.

2522.—*Potts or Young v. Niddrie and Benhar Coal Co.*, [1913] A. C. 531; 82 L. J. P. C. 147; [1913] W. C. & I. Rep. 547; 57 S. J. 685; 29 T. L. R. 626—H. L. (Sc.).

The question whether the members of the family of a deceased workman are dependent upon him, so as to be entitled to compensation under the Workmen's Compensation Act, 1906, is primarily one of fact, and the point for the consideration of the arbitrator is whether

the right of support possessed by the applicants is of any actual or practical value. Therefore, where a workman had deserted his wife and infant children, and the wife had obtained a decree for alimony in the Sheriff Court, and had arrested his wages under the decree, and he had subsequently removed in order to avoid further proceedings, and his wife had been unable to trace him, though she had endeavoured to do so:

HELD—that there was evidence that the children were dependants within the meaning of s. 13 of the Workmen's Compensation Act, 1906.

Notes.—In his judgment Viscount Haldane, L.C., said (in [1913] A. C., at pp. 535—537): “The mother's own earnings were so small that they were insufficient for her maintenance. The contributions from the earnings of the two elder children were not gifts made *ex pietate*, but were sums advanced to meet the necessities of the situation, which they or their mother might have recovered from the father. . . . The case is quite different from that of *New Monckton Collieries v. Keeling* [2521], recently decided by this House. There, there had been what was tantamount to an abandonment of the wife's right. She had left her husband more than twenty years before his death, and had virtually given up looking to him for support for herself and her children. Here the wife has kept her right alive, and was apparently only waiting for the opportunity to enforce it. The obligation of the father remained in existence. It was a valuable asset, and she and the children had nothing else that was reliable to look at.” *Hodgson v. Owners of West Stanley Colliery*, [1910] A. C. 229 [2506]; *Lee v. Owners of Ship Bessie* [2535]; *Sneddon v. Addie* [2529], referred to.

2523.—*Smith v. Cope*, [1913] W. C. & I. Rep. 460; 6 B. W. C. C. 569—C. A.

A husband and wife were living together until his death as the result of an accident in the course of his employment. The husband only earned a few shillings a week, while up to some three or four months before his death the wife had been earning 14s. a week for cooking, besides earning a few shillings for sewing. Some three or four months before his death the wife injured her hand, and since then she had been unable to earn anything. The county court judge held that the wife was in no degree dependent on her husband during the last year or two of his life, and refused to award her compensation.

HELD—that the county court judge had misdirected himself and that there must be a new trial.

2524.—*Polled v. Great Northern Railway* (No. 2) (1912), 5 B. W. C. C. 620; [1912] W. C. Rep. 379—C. A.

Several years before a workman's death his wife voluntarily left him and refused to return. Her daughter, aged sixteen at the time of the death, went with the mother. The workman did not contribute to the support of the mother and daughter.

HELD—there was evidence to support the finding of the county

court judge that neither wife nor daughter were dependent on the workman at the time of the death.

2525.—*Turners, Ltd. v. Whitefield* (1904), 6 F. 822; 41 Sc. L. R. 631—Ct. of Sess.

A woman had been living apart from her husband for fourteen years and was supported by her illegitimate son.

HELD—that she was not wholly or in part dependent on the earnings of her husband so as to be entitled to compensation under the Act in respect of his death by accident.

Notes.—*Main Colliery Co., Ltd. v. Davies* [2505] followed.

2526.—*Lindsay v. M'Glashen*, [1908] S. C. 762; 45 Sc. L. R. 559—Ct. of Sess.

In 1895 a wife voluntarily left her husband, and a month afterwards gave birth to a child. By her earnings and the assistance of relatives with whom she lived, she supported herself and her child, never asking for and never receiving aliment from her husband.

In 1907 the husband was killed by an accident in the course of his employment as a workman.

HELD—that neither the wife nor the child was either wholly or in part dependent upon the earnings of the workman at the time of his death.

Notes.—*Turners v. Whitefield* [2525] followed. Lord Ardwall, in his judgment, said: "I desire to express my concurrence with what was said by the Lord President on the construction of this Act in the case of *Baird v. Savage* [2527], and in particular I concur with his criticism of Lord Young's judgment in the case of *Sneddon v. Robert Addie & Sons Collieries, Ltd.* [2529]." *Main Colliery Co., Ltd. v. Davies* [2505]; *Moyes v. Dixon* [2507] referred to.

2527.—*Baird & Co., Ltd. v. Savage or Birsztan* (1906), 8 F. 438—Ct. of Sess.

In December, 1903, a Pole came to Scotland, where in the course of his employment as a miner he was killed in August, 1904. During that period he remitted £1 a week to his wife, who remained in Poland, and whose means of livelihood during her husband's absence consisted in addition to the £1 sent by her husband, of her earnings as an outdoor labourer at a wage of 9d. a day, and of contributions by her father.

HELD—that the wife was a "dependant" within the meaning of s. 7, sub-s. 2 (b), of the Act; but that she was not wholly dependent upon her husband's earnings at the time of his death within the meaning of paragraph 1 of the First Schedule of the Act.

Notes.—*Main Colliery Co., Ltd. v. Davies* [2505] followed. The Lord President, referring to the cases of *Cunningham v. M'Gregor & Co.* [2528]; *Sneddon v. Robert Addie & Sons Collieries, Ltd.* [2529]; and *Trainer v. Addie & Sons* [2517], said: "Each decision must be upon its own facts; and even supposing I, from a jury point

of view, should have come to a different conclusion from what other learned judges did, that does not show that the decision is wrong. But the expression which I rather take exception to, is about there being a legal presumption that a wife is dependent on the husband, a legal presumption which in each case has to be displaced. . . . In a proper sense it is not a presumption at all, either of fact or of law, but it is an inference of fact drawn from the experience of ordinary life, that if you know nothing about a wife, except that she is simply the wife of a husband, more especially in the class with which we are here dealing, the woman is dependent on her husband, because men's wives in such a class are, as a matter of fact, usually dependent on their husbands."

2528.—Cunningham v. M'Gregor & Co. (1901), 3 F. 775 ; 38 S. L. R. 574—Ct. of Sess.

A workman in respect of whose death compensation was claimed by his widow, had for the three years immediately preceding his death lived separate from his wife. His contribution to her support did not exceed £5 per annum. The claimant had no regular means of livelihood. In addition to what she received from her husband she was supported by her earnings from occasional employment and by contributions from her relations.

HELD—that she was, within the meaning of the Workmen's Compensation Act, 1897, First Schedule, paragraph 1(a) (i.), wholly dependent on her husband at the time of his death.

Notes.—The passage in Lord Young's judgment, "I can see nothing in that statement which displaces the legal presumption that a wife is wholly dependent on her husband," was expressly repudiated by the Lord President in *Baird v. Birsztan* [2527], as it was considered in Scotland to be of an unsettling tendency. See notes to *New Monckton Collieries v. Keeling* [2521].

2529.—Sneddon v. Robert Addie & Sons Collieries (1904), 6 F. 992 ; 41 Sc. L. R. 826—Ct. of Sess.

In July, 1901, a husband deserted his wife, and thereafter did not contribute anything to her support. She suffered from chronic bronchitis and varicose veins to an extent which incapacitated her from work requiring ordinary exertion, and she became unable to do anything for her own support. Her husband having, in 1904, in the course of his employment, sustained injuries from which he died, she claimed compensation from his employers.

HELD (*dubitante* the Lord Justice Clerk)—that the claimant was dependent on the earnings of her husband at the time of his death, and was entitled to compensation under the Act.

Notes.—*Cunningham v. M'Gregor & Co.* [2528] followed. *Turners, Ltd. v. Whitefield* [2525] distinguished. This case, in so far as it is based on the presumption of the dependency of a wife, is clearly not law since the decision in *New Monckton Collieries v. Keeling* [2521]. In his judgment in that case, Lord Shaw expressly referred to the

decision in *Turners, Ltd. v. Whitefield*, as being one of the cases laying down the correct principle of law as applied in Scotland, and being in entire accord with the views set forth in *Main Colliery Co., Ltd. v. Davies* [2505] and *Hodgson v. West Stanley Colliery Co.* [2506]. See the notes to *New Monckton Collieries v. Keeling* [2521] and *Hodgson v. West Stanley Colliery Co.* [2506].

N.B.—The five following cases were wrongly decided on the presumption of a wife's dependency.

2530.—*Williams v. Ocean Coal Co.*, [1907] 2 K. B. 422 ; 76 L. J. K. B. 1073 ; 97 L. T. 150 ; 23 T. L. R. 584 ; 51 S. J. 551—C. A.

Dependency within the meaning of s. 7, sub-s. 2, of the Workmen's Compensation Act, 1897, must always be a mixed question of law and fact. There is a presumption in favour of the dependency of the wife upon her husband's earnings, which is not rebutted by proof that at the time of his death he was not in fact supporting her.

The rule in *Villar v. Gilbey*, 76 L. J. Ch. 339 ; [1907] A. C. 139, that a child *en ventre sa mère* shall be deemed to have been born, where it is for its benefit that it should be born, applies in the case of a posthumous child, and consequently such child is a dependant within the Act.

An applicant for compensation was the widow of a workman, to whom she had been married in March, 1903, and who was killed in April, 1906. The husband had not kept up a home for the wife, and had not since 1904 contributed to her support, she having in that year returned to her parents. The wife in January, 1906, went into domestic service, receiving £1 a month and board wages, and was in such service at the time of her husband's death. There was also a child *en ventre sa mère* at such time, who was born in September, 1906. The county court judge having decided that neither the widow nor the child were dependants within the Act, the Court of Appeal, reversing his decision,

HELD that he was wrong—first, in ignoring the presumption of dependency in the case of the wife ; and secondly, in treating as conclusive the fact that the wife was not receiving any part of her husband's earnings at his death ; and, instead of sending the case back, the court held that, as a matter of legal inference upon the facts in evidence, there was total dependency both in the case of the widow and of the posthumous child.

Notes.—This case, following the decisions in *Queen v. Clarke* [2534] ; *Coulthard's Case* [2531] ; and *Stanland's Case* [2532], was decided on the presumption of a wife's dependency, and thus is clearly not good law, since the decision in *Hodgson v. West Stanley Colliery Co.* [2506]. It is, however, according to the judgment of Lord Robson in *New Monckton Collieries v. Keeling* [2521], still of some value, and in his opinion rightly decided upon the facts. Lord Robson's judgment does not agree with the other judgments in *Keeling's Case*, and should be compared with them. Lord Shaw, in *Keeling's Case*, at p. 658, says, referring to *Coulthard's Case*, *Stanland's Case*, and *Williams v. Ocean Coal Co.* : " I cannot at

present understand how these cases can now be set up, conflicting as they do with the passages that I have ventured to cite from the judgments in *Hodgson's Case*." See notes to *Hodgson's Case* [2506] and *New Monckton Collieries v. Keeling* [2521].

2531.—Coulthard v. Consett Iron Co., [1905] 2 K. B. 869; 75 L. J. K. B. 60; 93 L. T. 756; 54 W. R. 139; 22 T. L. R. 25—C. A.

In an arbitration under the Workmen's Compensation Act, 1897, it appeared that the applicant, the widow of the injured workman, had been married to him for many years, and had been maintained by him up to a date about four months before his death. He was then out of work, and he left her, apparently to find work, and never afterwards contributed anything to her maintenance. During the time he was away she obtained casual work when she could, and received help from her friends. She said in her evidence that she expected him back every day to provide a home. He obtained employment three weeks before his death.

HELD—that the county court judge was justified in holding that the applicant was dependent upon the earnings of the deceased at the time of his death.

Notes.—See the note to *Williams v. Ocean Coal Co.* [2530]. *Rees v. Penrikyber Navigation Colliery Co.* [2516] distinguished. *Turners v. Whitefield* [2525]; *Sneddon v. Robert Addie & Sons* [2529]; *Cunningham v. McGregor & Co.* [2528], referred to.

2532.—Stanland v. North Eastern Steel Co. (No. 2), [1907] 2 K. B. 422—C. A.

A husband and wife married in 1903, separated the following year, when the husband went to work as a miner. The wife lived with her parents, but occasionally saw her husband, the last occasion being in December, 1905. In April, 1906, the husband was killed. A posthumous child, of which deceased was the father, was born in September, 1906. The husband had not contributed to the wife's support since 1904.

HELD—that there was a legal presumption of dependency in the case of the wife, who was therefore totally dependent on her husband.

HELD FURTHER, applying the rule in *Villar v. Gilbey*, [1907] A. C. 139—that the posthumous child was also a dependant.

Notes.—See the note to *Williams v. Ocean Coal Co.* [2530].

2533.—Kelly v. Hopkins, [1908] 2 Ir. R. 84—C. A. (Ir.).

A workman, who died as the result of an accident arising out of and in the course of his employment, had maintained his wife until her removal as a dangerous lunatic to a lunatic asylum, where she was detained by the asylum authorities under confinement, and where she was being maintained by them at the date of her husband's death.

HELD—that these circumstances were insufficient to rebut the

presumption of dependency, and that there was a total dependency of the wife on her husband's earnings.

Notes.—See the note to *Williams v. Ocean Coal Co.* [2530], and compare [2516], [2517].

2534.—Queen v. Clarke, [1906] 2 Ir. R. 135—C. A. (Ir.)

The applicant, the widow of a workman, was married on July 15th, 1904, at Glasgow, both she and her husband being Scotch by domicile. She lived with her husband in Glasgow, and was supported by him till the end of October, 1904, when being out of work, he went to Dublin to seek employment. He obtained employment there from the respondent on January 9th, 1905, and on January 17th he was accidentally killed in the course of his employment. From the time the husband left Glasgow until his death he did not contribute anything to the support of his wife, who went to reside with her father in Glasgow, and was supported by him. A posthumous child was born on April 15th, 1905.

HELD (Fitzgibbon, L.J., *diss.*)—that the widow and the child were wholly dependent upon the earnings of the workman at the time of his death within the meaning of s. 7, sub-s. 2 (a), of the Act.

Notes.—This case, in so far as it sets up that a posthumous child can be a dependant, is of course good law, but in so far as it establishes that there is a legal presumption of dependency, it is no longer law since the decision in *Hodgson v. West Stanley Colliery* [2506] See note to *Williams v. Ocean Coal Co.* [2530].

III. *Parent and Child.*

(1) *General Principles.*

N.B.—See *Potts or Young v. Niddrie and Benhar Coal Co.* [2522].

2535.—Lee v. Owner of Ship Bessie, [1912] 1 K. B. 83; 81 L. J. K. B. 114; 105 L. T. 659; 12 Asp. M. C. 89; 5 B. W. C. C. 55; [1912] W. C. Rep. 57—C. A.

The principle established by the decision of the House of Lords in *New Monckton Collieries v. Keeling*, [1911] A. C. 648, that dependency within the meaning of the Workmen's Compensation Act, 1906, is a question of fact, and that there is no legal presumption of dependency in the case of a wife, applies equally to the case of infant children.

Where, therefore, there was no evidence of dependency in fact of infant children on their father, a workman, whose death had been caused by an accident within the Act, they not having in any way been maintained by him at the time of his death, they were held not to be entitled to compensation.

Notes.—*Briggs v. Mitchell* [2538] followed. *Sheton v. Springett* (1851), 11 C. B. 452, at p. 455, referred to. See the notes to *New Monckton Collieries v. Keeling* [2521] and to *Hodgson v. West Stanley Colliery* [2506].

2536.—Dobbie v. Egypt and Levant Steamship Co., [1913] S. C. 364 ; [1913] W. C. & I. Rep. 75 ; 50 Sc. L. R. 222 ; 6 B. W. C. C. 348—Ct. of Sess.

Dependency is always a question of fact ; and, even where children have been deserted by their father for three years before his death and have received no support from him during that time, they may still be held to be partially dependent upon him if there was a reasonable probability that had he lived he would in the future have contributed to their support.

Notes.—The Lord President referred to a passage in the judgment of Lord Moulton, in *Lee v. Owners of the Ship Bessie*, [1912] 1 K. B. at p. 89 [2535], where he says : “ In my opinion . . . the decision of the House of Lords in *New Monckton Collieries v. Keeling*, [1911] A. C. 648 [2521], although it does not refer to the case of infant children, logically carries with it the result that in their case the county court judge is bound to consider the practical value of the father’s legal obligation to support them, and that if he comes to the conclusion that there is a reasonable probability that this will be enforced in the future, he is entitled and bound to hold them to be dependants and to award compensation accordingly.” *Briggs v. Mitchell* [2538] applied.

2537.—Cooper v. Fife Coal Co., [1907] S. C. 564—Ct. of Sess.

A workman was killed in the course of his employment. For eight years he had supported A., a child of his deceased daughter. A.’s father had not been heard of during that time, and it was not known whether he was alive or dead. Nothing was known about A.’s paternal grandparents. The workman was survived by a son and daughter.

HELD—that A. was a dependant of the deceased workman within s. 7, sub-s. 2, of the Workmen’s Compensation Act, 1897.

Notes.—*Eisten v. North British Railway Co.*, 8 Macph. 980 ; *Hanlin v. Melrose and Thomson*, 1 F. 1012 ; *Wilson v. Heritors of Kirk-Session of Cockspen*, 3 S. 547 ; *Bell v. Bell*, 17 R. 549 ; *Hamilton v. Hamilton*, 4 R. 688 ; *Greenhorn v. Addie*, 17 D. 860, referred to.

(2) *Illegitimate Child.*

2538.—Briggs v. Mitchell, [1911] S. C. 705 ; 48 Sc. L. R. 606 ; 4 B. W. C. C. 400—Ct. of Sess.

B. died on July 12th, 1910, as the result of an injury sustained by her in the course of her employment. On May 11th, 1910, she had been delivered of an illegitimate female child. Prior to the birth an arrangement had been made between her and Mrs. R. that the latter should take over the child when born, if a girl, without payment and to be adopted as her own. The child was accordingly, on its birth, given over to Mrs. R., was named after her, and thereafter remained with her. B. had stated that she would “ give the child a minding ” every half-year ; she had handed it over to Mrs. R. clothed, and had given the latter 3s. 6d., including materials for a shawl for the child.

Apart from this, the child had been wholly maintained by Mrs. R. and her husband.

HELD—that the child was not a dependant of the mother in the sense of the Workmen's Compensation Act, 1906.

Notes.—In the judgments in this case the decision of the Court of Appeal in *Keeling v. New Monckton Collieries*, [1911] 1 K. B. 250 (since reversed [1911] A. C. 648 [2521]), was discussed and differed from. The English cases of *Main Colliery Co. v. Davies* [2505], and *Hodgson v. West Stanley Colliery* [2506], and the Scotch cases of *Turners v. Whitefield* [2525]; *Moyes v. Dixon* [2507]; *Baird v. Birsztan* [2527]; *Lindsay v. M'Glashen* [2526], followed. *Orrell Colliery Co. v. Schofield* [2543] distinguished. *Coulthard v. Consett Iron Co.* [2581] and *Williams v. Ocean Coal Co.* [2530] referred to.

2539.—*McLean v. Moss Bay Hematite Iron and Steel Co., Ltd.*, [1910] W. N. 102; 54 S. J. 541; 3 B. W. C. C. 402—H. L.

M. had married a woman with an illegitimate son, of whom he was not the putative father. The three lived together, the son paying his wages to his mother, who put them into the common fund out of which the whole family was maintained. The son was killed by accident and the mother claimed compensation as a “dependant.”

HELD (without hearing argument)—that, as dependency was a question of fact in each case, and as it was admitted that on the facts in this case the mother was dependent in part on her son's earnings, she was entitled to compensation.

Notes.—This was a decision of the House of Lords, delivered with the consent of the respondents, without any argument being heard, since the decision in this case in the Court of Appeal, [1909] 2 K. B. 521, was overruled in the House of Lords by *Hodgson v. Owners of West Stanley Colliery* [2506]. See the notes to that case and to *New Monckton Collieries v. Keeling* [2521].

2540.—*Bowhill Coal Co. (Fife), Ltd. v. Neish*, [1909] S. C. 252; 46 Sc. L. R. 250—Ct. of Sess.

The mother of an illegitimate child obtained in an action of filiation and aliment decree for £6 6s. annually for ten years against the father. He, by changing his name, evaded payment for some time, but finally the mother found him and arrested a sum of £2 in his employer's hands. She did not proceed with a forthcoming, but the father agreed that the money should be uplifted for behoof of the child. Thereafter the father, the money never having been uplifted, died from injuries sustained in the course of his employment. No other money was contributed by the father to the child's support.

HELD—that whether a claimant is a “dependant” is a question of fact upon which the arbiter's decision is final, unless the case discloses that the decision of the question in fact has been determined by an error in law, and that here no such error appeared, it not being necessary to show that the money had been actually spent upon the child.

Notes.—*Main Colliery Co. v. Davies* [2505] followed. See also *Orrell Colliery Co. v. Schofield* [2543].

2541.—*Wallace v. Fife Coal Co.*, [1909] S. C. 682; 46 Sc. L. R. 727—Ct. of Sess.

In an arbitration under the Workmen's Compensation Act, 1906, a claim was made by a woman on behalf of herself and of her child, who was born after the death of the workman, who alleged that she was the wife of the deceased workman, and in proof of the marriage tendered evidence of cohabitation and habit and repute, extending over a period of ten months.

HELD—that this was insufficient to support the inference that a marriage had taken place, and that the child was illegitimate. The court declined to rule whether it was competent for the arbitrator to determine whether the claimant was the widow of the deceased workman.

Notes.—*Johnstone v. James Spencer & Co.* [2524] distinguished on the ground that in that case the only fact to be proved was the paternity of an illegitimate child. *Lapsley v. Grierson*, 8 D., at p. 61, cited.

2542.—*Johnstone v. James Spencer & Co.*, [1908] S. C. 1015; 45 Sc. L. R. 802; 1 B. W. C. C. 302—Ct. of Sess.

In an arbitration under the Workmen's Compensation Act, 1906, a claim was made by a girl who alleged that she was an illegitimate child of the deceased workman. The arbitrator stayed proceedings in order that she might establish her allegations in a competent court.

HELD—that it was the duty of the arbitrator, in determining the question whether the claimant was a dependant, to decide incidentally her relationship to the deceased.

Note.—*M'Donald v. Mackenzie*, 18 R. 502, referred to.

(3) *Posthumous Child.*

N.B.—See also *Queen v. Clarke* [2534] and *Williams v. Ocean Coal Co.* [2530].

2543.—*Orrell Colliery Co. v. Schofield*, [1909] A. C. 433; 78 L. J. K. B. 677; 100 L. T. 786; 53 S. J. 518; 25 T. L. R. 569—H. L. (E.)

The posthumous illegitimate child of a workman accidentally killed in the course of his employment is entitled to compensation as a "dependant" within the meaning of the Workmen's Compensation Act, 1906.

2544.—*Ward v. Pitt & Co.*, *Lloyd v. Powell Duffryn Steam Coal Co.*, [1913] 2 K. B. 130; 82 L. J. K. B. 533; [1913] W. C. & I. Rep. 355; 108 L. T. 201; 57 S. J. 301; 29 T. L. R. 291; 6 B. W. C. C. 142—C. A. *Reversed*, 136 L. T. 7. 605; 49 L. J. 229; *Times* Newsp., 7th April, 1914—H. L.

In two cases compensation was claimed under the Workmen's Compensation Act, 1906, on behalf of an illegitimate posthumous child of a workman killed by an accident arising out of and in the

course of his employment. In each case evidence was given as to the paternity of the child, and that the deceased man was aware of this and had made statements showing his intention of marrying the mother and supporting the child.

HELD—that the statements of the deceased man as to his intention to marry the mother could not properly be admitted in evidence, and that in their absence there was no evidence from which the dependency in fact of the illegitimate posthumous child could be inferred.

A statement by a deceased man of his intention to marry some woman is not against his interest when made. Dependency is a question of fact, to be proved by evidence. The mere admission by a man of his paternity of an illegitimate child is not sufficient to establish the child's dependency.

The admissibility in evidence of statements by a deceased person as being against his interest is governed by the following rules: First, the deceased must have made a statement of some fact of the truth of which he had peculiar knowledge. The rule applies only as to acts done by the deceased and not by third parties. Secondly, such fact must have been to the deceased's immediate prejudice—that is, against his interest at the time when he stated it. Thirdly, the deceased must have known the fact to be against his interest when he stated it. Fourthly, the interest to which the statement must be adverse must be a pecuniary or a proprietary one.

Semble, a statement of a contract is not in itself a statement against interest.

Notes.—Judgment of C. A. reversed by H. L.; see 136 L. T. J. 605. Hamilton, L.J., in reading the judgment of the Court of Appeal, referred to the following (amongst other) decisions relating to the admissibility of evidence in cases of this kind:—*R. v. Birmingham Overseers* (1861), 1 B. & S. 763; *Higham v. Ridgway*, 10 East, 109; *Short v. Lee* (1821), 2 Jac. & W. 464; *Gleadow v. Atkin*, 1 Cr. & M. 410; *Sussex Peerage Case*, 11 Cl. & F. 85; *Lord Trimlestown v. Kemmis*, 9 Cl. & F. 749; *Massey v. Allen*, 13 Ch. D. 558; *Doe v. Vowles*, 1 M. & R. 261; *Hyde v. Palmer*, 32 L. J. Q. B. 126. Upon the question of dependency *New Monckton Collieries v. Keeling* [2521] and *Orrell Colliery Co. v. Schofield* [2543] referred to.

IV. *Alien Dependant.*

2545.—*Krzus v. Crow's Nest Pass Coal Co.*, [1912] A. C. 590; 107 L. T. 77; 28 T. L. R. 488; 56 S. J. 632; 6 B. W. C. C. 270; [1913] W. C. & I. Rep. 38—P. C.

HELD—that under the British Columbia Workmen's Compensation Act, 1902 (which is practically identical with the Workmen's Compensation Act of 1897 of the United Kingdom), the widow of an alien workman who lost his life by an accident in the course of his employment by the respondents was entitled to compensation as a dependant of the deceased, notwithstanding that she was residing in a foreign country at the dates both of the accident and the death; and that the appellant as the legal personal representative of the deceased was entitled to payment thereof in trust for her.

Notes.—*Tomalin v. S. Pearson & Son, Ltd.*, [1909] 2 K. B. 61 [1837]; *Jefferys v. Boosey*, 4 H. L. C. 815, distinguished. *Baird v. Birsztan* [2527]; *United Collieries v. Simpson* [2550], referred to.

V. Dependent at the Time of Workman's Death.

2546.—*Pryce v. Penrikyber Navigation Colliery Co.*, [1902] 1 K. B. 221; 71 L. J. K. B. 192; 50 W. R. 197; 66 J. P. 198; 18 T. L. R. 54—C. A.

A dependant of a workman is none the less “wholly dependant upon his earnings at the time of his death” within the meaning of the First Schedule, paragraph 1 (a) (i.), of the Workmen’s Compensation Act, 1897, because upon the death of the workman his small personal estate, the result of his savings, which produced no income during his life, passes to the dependant.

Notes.—See the judgment of Lord Collins, M.R., in this case ([1902] 1 K. B., at p. 223): “The scheme of the Act was to take the fixing of the amount to be awarded out of the hands of the judge, and in order to avoid the necessity for embarking on a troublesome inquiry, an arbitrary standard is fixed. . . . The only time at which to draw the line is the time of the death of the workman, and sources of income which may arise after that date cannot be taken into consideration.”

2547.—*Robertson v. Hall Brothers Steamship Co.* (1910), 3 B. W. C. C. 368—C. A.

A father claimed compensation as a dependant of his son, who had paid considerable sums to the family fund while employed as a fisherman in 1906, 1907, and 1908; the last payment was made early in 1909. In the summer of that year he made two voyages of a month, receiving £2 5s. a month wages and his keep. He did not send any part of the £2 5s. home to his father, and on the last of these voyages he was drowned.

HELD—that the fact that at the time of the son’s death no money was being sent home was not sufficient to upset the county court judge’s finding of fact that the father was a partial dependant.

Notes.—Cozens-Hardy, M.R., in his judgment said: “We should be whittling away the Act were we to say that where money payments have been made, as here, and when the workman is out of employment, or out of full employment for a short time, that then there was no dependency.” *Turner v. Miller and Richards* [2548] referred to.

2548.—*Turner v. Miller and Richards* (1910), 3 B. W. C. C. 305—C. A.

A workman who was drowned at sea had been accustomed in previous employments to give money regularly to his parents, who, with their family, claimed compensation as dependants of the deceased. The judge found that the family were partly dependent on the workman’s earnings, and awarded compensation.

HELD—that, dependency being a question of fact, there was evidence to support the decision.

HELD ALSO—that it is the duty of a county court judge to take a note, whether he is requested to do so or not.

Notes.—*Main Colliery Co., Ltd. v. Davies*, [1900] A. C. 358 [2505], followed.

2549.—Wainwright v. Crichton (1904), 117 L. T. J. 2—C. A.

A man aged sixty-four, who alleged that he was suffering from a pain in his back consequent on an old wound, claimed with his wife to be wholly dependent on his son who died on May 11th as a result of an accident sustained on April 4th. Evidence was given that in March 10th, the son had entered into an agreement to maintain his father, and that his father had ceased to work from that date to May 11th, but that previous to that date he had been earning £2 a week. Medical evidence was tendered as to the father's earning capacity after his son's death, but the county court judge held that he was precluded from receiving such evidence by reason of the decision in *Pryce v. Penrkyber Navigation Colliery Co.* [2546].

HELD—that the evidence should be admitted.

VI. *Devolution of Compensation Money.*

2550.—United Collieries v. Simpson or Hendry, [1909] A. C. 383; 78 L. J. P. C. 129; 101 L. T. 129; 53 S. J. 630; 25 T. L. R. 678—H. L. (Sc.).

Where a workman has been killed by an accident arising out of and in the course of his employment, and his dependant dies without making a claim, the dependant's legal personal representative is entitled to compensation under the Workmen's Compensation Act, 1906 (Lord Dunedin *diss.*).

Notes.—*Darlington v. Roscoe & Sons* [2551] approved. *O'Donovan v. Cameron, Swan & Co.* [2552] disapproved. *Auld v. Sharp* (1874), 2 R. 191; *Finlay v. Chirney* (1888), 20 Q. B. D. 494, at p. 502; *Darling v. Gray* (1892), 19 R. (H. L.) 31; *Neilson v. Rodger* (1853), 16 D. 325, cited. See also *Williams v. Vauxhall Colliery Co.* [2583].

2551.—Darlington v. Roscoe & Sons, [1907] 1 K. B. 219; 76 L. J. K. B. 371; 96 L. T. 179; 23 T. L. R. 167; 51 S. J. 130—C. A.

If a notice of claim under the Workmen's Compensation Act, 1897, has been given by a "sole dependant," who dies before a request for arbitration is made or other proceedings are taken, the right to claim survives to such dependant's legal personal representative, and the maxim "*Actio personalis moritur cum persona*" does not apply.

Notes.—*Peebles v. Oswaldtwistle Urban District Council*, [1896] 2 Q. B. 159, referred to as an authority for the proposition "that, where a statutory right is conferred on a person as in the present case, that right is one which passes to his legal personal representative." *O'Donovan v. Cameron, Swan & Co.* [2552] distinguished.

Powell v. Main Colliery Co., [1900] A. C. 366, at pp. 371, 381 [2279], referred to.

2552.—*O'Donovan v. Cameron, Swan & Co.* [1901] 2 Ir. R. 633; 34 Ir. L. T. R. 159—C. A.

The sole total dependant of a workman who was killed by an accident arising out of his employment died before she had filed or served a claim for compensation under the Workmen's Compensation Act, 1897. If she had lived and taken the necessary steps, it was admitted that she would have been entitled to £150 compensation. The personal representative of the deceased workman subsequently took proceedings in the county court to recover compensation to be applied for the benefit of the dependant and in payment of her debts.

HELD—that neither her personal representative nor the personal representative of the deceased workman was entitled to recover the amount.

Notes.—*Powell v. Main Colliery Co.*; [1900] A. C. 366 [2279], cited. The decision in this case was disapproved by the House of Lords in *United Collieries v. Simpson or Hendry* [2550], where it was held that the right to compensation vests in the dependant, and is transmitted to his legal representatives on his death, even though the dependant has died without having made a claim for it.

VII. *Apportionment of Compensation Money.*

2553.—*Manchester v. Carlton Iron Co.* (1904), 89 L. T. 730; 52 W. R. 291; 68 J. P. 209; 20 T. L. R. 155—C. A.

When compensation is awarded under the Workmen's Compensation Act, 1897, to the dependants of a deceased workman, the arbitrator must make a definite allotment of the money for the benefit of each dependant, except so far as any dependant being of age and capable of making an agreement may agree to give up his or her share for the benefit of the other dependants.

2554.—*Skipper v. Nicholson* (1909), 127 L. T. J. 202—County Court.

Where £142 had been paid into court in consequence of the death of a workman who left as sole dependants two children not born in wedlock, His Honour Judge Mulligan refused to make any apportionment, and said it was important where the deceased had not been married to consider the possible result of an apportionment. He had to consider what was for the benefit of both infants. If he divided the money into shares, and if one of the infants should die in infancy, the share of the infant so dying would go to the Crown, and not to the other infant. He thought a proper order to make in the circumstances would be to direct 5s. a week to be paid to the guardian for the infants until further order, and, subject thereto, he declared and directed that the moneys paid in ought to be invested and held for the two children upon a joint account, until the younger or the survivor, as the case might be, should attain twenty-one, or until a further intermediate order should be made.

2555.—*Cheverton v. Oceanic Steam Navigation Co.* (No. 2), [1913]
W. C. & I. Rep. 462 ; 29 T. L. R. 658 ; 6 B. W. C. C. 574—
C. A.

In claims for compensation under the Workmen's Compensation Act, 1906, it is for the county court judge to find the *quantum* of compensation to be awarded, and the Court of Appeal will not interfere with his award unless there has been misdirection or no proper exercise of his judicial discretion.

Notes.—This was the second appeal in this case. See *Cheverton v. Oceanic Steam Navigation Co.* (No. 1) [2588].

DEFINITIONS—*cont.*

D. "Local or other Public Authority."

The words "powers and duties of a local or other public authority" do not refer only to absolute duties, but also include discretionary duties. Thus, if a local authority in the exercise of its powers contracts with a contractor for the execution of work (*e.g.*, for the removal of old buildings from the land of the local authority), the local authority will be liable as principal under s. 4 of the Act to pay compensation to a workman injured in the course of his employment by the contractor under the contract (*Mulrooney v. Todd* [2315]; see also *Hardford v. County Dublin County Council* [2316]). As to the position of teachers paid by the local education authority, see *Crocker v. Mayor and Corporation of Plymouth* [2556] and *In re Pupil Teachers* [2557].

2556.—*Crocker v. Mayor and Corporation of Plymouth*, [1906] 1 K. B. 495—Div. Ct.

Sect. 7 of the Education Act, 1902, does not create privity of contract between a teacher in a non-provided school and the local education authority, notwithstanding the fact that the salary of the teacher is paid directly by the authority. The teacher, therefore cannot maintain an action for salary against the local education authority.

2557.—*In re Pupil Teachers*, [1913] 1 Ir. R. 219—Ch. D. (Ir.)

The employment of pupil teachers and monitors in National Schools in Ireland is a "contract of service" within the meaning of the National Insurance Act, 1911.

Notes.—*In re Employment of Church of England Curates* [2502] and *Poor Law Officers of Ireland*, 47 Ir. L. T. 28, referred to. See also the note to *Scottish Insurance Commissioners v. Royal Infirmary of Edinburgh* [2504].

SPECIAL PROVISIONS AS TO SCOTLAND.

Sect. 14.—In Scotland, where a workman raises an action against his employer independently of this Act in respect of any injury caused by accident arising out of and in the course of the employment, the action, if raised in the sheriff court and concluding for damages under the Employers' Liability Act, 1880, or alternatively at common law or under the Employers' Liability Act, 1880, shall, notwithstanding anything contained in that Act, not be removed under that Act or otherwise to the Court of Session, nor shall it be appealed to that court otherwise than by appeal on a question of law; and for the purposes of such appeal the provisions of the Second Schedule to this Act in regard to an appeal from the decision of the sheriff on any question of law determined by him as arbitrator under this Act shall apply.

2558.—**Banknock Coal Co. v. Lawrie**, [1912] A. C. 105; 81 L. J. P. C. 89; 106 L. T. 283; 28 T. L. R. 136; 49 Sc. L. R. 98; 5 B. W. C. C. 209; [1912] W. C. Rep. 1—H. L.

The father of a workman killed by accident brought an action at common law, or alternatively under the Employers' Liability Act, 1880, for damages in respect of the workman's death. The sheriff allowed the case to go to proof. The father then applied that the case should be remitted to the Court of Session for trial by jury by virtue of s. 30 of the Sheriff Courts (Scotland) Act, 1907. The employers contended that the application to remit was incompetent owing to ss. 13 and 14 of the Workmen's Compensation Act, 1906.

HELD—that the application was not incompetent, for although it might be that the effect of ss. 13 and 14 of the Workmen's Compensation Act, 1906, was to bar any appeal to the Court of Session except on a question of law, the right, if taken away by the Act of 1906, had been restored by s. 30 of the Sheriff Courts (Scotland) Act, 1907.

Notes.—See also *Brown v. Glenboig Fireclay Co.* (1910), 48 Sc. L. R., 245, a similar decision to the above.

PROVISIONS AS TO EXISTING CONTRACTS AND SCHEMES.

Sect. 15.—(1) Any contract (other than a contract substituting the provisions of a scheme certified under the Workmen's Compensation Act, 1897, for the provisions of that Act) existing at the commencement of this Act, whereby a workman relinquishes any right to compensation from the employer for personal injury arising out of and in the course of his employment, shall not, for the purposes of this Act, be deemed to continue after the time at which the workman's contract of service would determine if notice of the determination thereof were given at the commencement of this Act,

(2) Every scheme under the Workmen's Compensation Act, 1897, in force at the commencement of this Act shall, if re-certified by the registrar of Friendly Societies, have effect as if it were a scheme under this Act.

(3) The registrar shall re-certify any such scheme if it is proved to his satisfaction that the scheme conforms, or has been so modified as to conform, with the provisions of this Act as to schemes.

(4) If any such scheme has not been so re-certified before the expiration of six months from the commencement of this Act, the certificate thereof shall be revoked.

[See note and cases of *Godwin v. Lords Commissioners of the Admiralty* [2308]; *Moss v. Great Eastern Railway* [2305]; *Wallace v. Hawthorne, Leslie & Co.*, [2306], sub tit. "Contracting Out," s. 3.]

COMMENCEMENT, REPEAL AND TITLE.

Sect. 16.—(1) This Act shall come into operation on the first day of July nineteen hundred and seven, but, except so far as it relates to references to medical referees, and proceedings consequential thereon, shall not apply in any case where the accident happened before the commencement of this Act.

(2) The Workmen's Compensation Acts, 1897 and 1900, are hereby repealed, but shall continue to apply to cases where the accident happened before the commencement of this Act, except to the extent to which this Act applies to those cases.

Sect. 17. This Act may be cited as the Workmen's Compensation Act, 1906.

2559.—**Mackay v. Rosie** (No. 2), 105 L. T. 682; 56 S. J. 87; 5 B. W. C. C. 181; [1912] S. C. (H. L.) 7; 49 Sc. L. R. 48; [1912] W. C. Rep. 41—H. L.

Sect. 16, sub-s. 1, of the Workmen's Compensation Act, 1906, enacts. "This Act shall come into operation on the first day of July, 1907, but, except so far as it relates to references to medical referees and proceedings consequential thereon, shall not apply in any case where the accident happened before the commencement of this Act." Sched. II., par. 17 (*b*), gives an appeal to the House of Lords from a decision of the Court of Session.

In an arbitration under the Workmen's Compensation Act, 1897, arising out of an accident which occurred on November 20th, 1906, the arbiter, with consent, remitted to a medical referee, and on his report, without further evidence, gave his decision reducing the compensation previously paid by a half. The employer appealed by stated case to the Court of Session, whose decision was that compensation should be ended.

HELD—that the House of Lords had no jurisdiction to entertain an appeal, as the words "proceedings consequential" on references to medical referees would not cover the case.

SCHEDULES.

FIRST SCHEDULE.

SCALE AND CONDITIONS OF COMPENSATION.

(1) The amount of compensation under this Act shall be—

(a) where death results from the injury—

(i.) if the workman leaves any dependants wholly dependent upon his earnings, a sum equal to his earnings in the employment of the same employer during the three years next preceding the injury, or the sum of one hundred and fifty pounds, whichever of those sums is the larger, but not exceeding in any case three hundred pounds, provided that the amount of any weekly payments made under this Act, and any lump sum paid in redemption thereof, shall be deducted from such sum, and, if the period of the workman's employment by the said employer has been less than the said three years, then the amount of his earnings during the said three years shall be deemed to be one hundred and fifty-six times his average weekly earnings during the period of his actual employment under the said employer ;

(ii.) if the workman does not leave any such dependants, but leaves any dependants in part dependent upon his earnings, such sum, not exceeding in any case the amount payable under the foregoing provisions, as may be agreed upon, or, in default of agreement, may be determined, on arbitration under this Act, to be reasonable and proportionate to the injury to the said dependants ; and

(iii.) if he leaves no dependants, the reasonable expenses of his medical attendance and burial, not exceeding ten pounds ;

(b) where total or partial incapacity for work results from the injury, a weekly payment during the incapacity not exceeding fifty per cent. of his average weekly earnings during the previous twelve months, if he has been so long employed, but if not then for any less period during which he has been in the employment of the same employer, such weekly payment not to exceed one pound :

Provided that—

(a) if the incapacity lasts less than two weeks no compensation shall be payable in respect of the first week ; and

(b) as respects the weekly payments during total incapacity of a workman who is under twenty-one years of age at the date of the injury, and whose average weekly earnings are less than twenty shillings, one hundred per cent. shall be substituted for fifty per cent. of his average weekly earnings, but the weekly payment shall in no case exceed ten shillings.

SCALE OF COMPENSATION.

Paragraph (1) of Schedule I. deals with the amount of compensation payable under the Act. The scale of compensation may be gathered from the following Table :—

A.—DEATH.

I. *Total Dependency.*

- (1) *If Workman was with same employer during preceding three years.*

A sum equal to his aggregate earnings with same employer during the three years.

- (2) *If workman was with same employer for less than three years.*

A sum equal to 156 times his average weekly earnings during the actual employment with same employer.

N.B.—In either case the *maximum* is £300, and the *minimum* £150.

II. *Partial Dependency.*

- (1) Such sum as may be agreed upon; or, in default of agreement,

- (2) Such sum as may be determined, on arbitration under the Act, to be reasonable and proportionate to the injury.

N.B.—*Maximum*, same as in total dependency; no *minimum*.

III. *No Dependants.*

Medical attendance and burial expenses up to £10.

[For procedure see Workmen's Compensation Rules, 1913, rule 6.]

B.—DISABLEMENT.

I. *Total Incapacity.*

- (1) *If workman over twenty-one, or being under twenty-one, earns not less than £1 a week.*

A weekly payment not exceeding 50 per cent of his average weekly earnings during the preceding twelve months or any less period with the same employer, with a maximum of £1 a week.

- (2) *If workman under twenty-one, and earning less than £1 a week.*

One hundred per cent. is substituted for 50 per cent., with a maximum of 10s. a week.

II. *Partial Incapacity.*

A weekly sum not exceeding the lowest of the three following :—

- (1) One half of his average weekly earnings during the previous twelve months or less period in the employment of the same employer.
- (2) £1.
- (3) The difference between the amount of the average weekly earnings of the workman before the accident, and the average weekly amount which he is earning or is able to earn in some suitable employment or business after the accident.

See the judgment of Fletcher Moulton, L.J., in *Bevan v. Energlyn Colliery Co.*, [1912] 1 K. B., at p. 70 [2705].

The cases will be considered under the following headings :—

Firstly. Where death results from the injury (Schedule I. (1) (a)). The only question to be considered is, did the death in fact result from the injury? If no new cause, no *novus actus* intervenes, death has, in fact, resulted from the injury, even though at the time of the injury it could not be reasonably expected as the probable consequence thereof (*Dunham v. Clare* [2560]; *Malone v. Cayzer, Irvine & Co.* [2561]). Even where death is only accelerated by the injury and not directly caused by it, it results from the injury (*Dunnigan v. Cavan and Lind* [2562]; *Golder v. Caledonian Railway* [2563]; *Connell v. Barr* [2564]); or where the workman recovers from the direct effects of the accident, but dies from a disease which proves fatal owing to the weakened condition to which he is reduced by the accident (*Thorburn v. Bedlington Coal Co.* [2565]). Death under an anæsthetic, administered to perform a reasonable operation in consequence of an accident, will be held to have resulted from the injury (*Shirt v. Calico Printers' Association* [2567]; but compare *Charles v. Walker* [2568], where a *novus actus* intervened); see also *Thomson v. Mutter, Howey & Co.* [2569]. The burden of proof is upon the applicant (*Euman v. Dalziel* (No. 2) [2570]). The question whether death resulted from the injury is purely one of fact. *Cameron v. Port of London Authority* [2571] and other cases are mentioned on this point.

Secondly. Rights of dependants wholly dependent (Schedule I. (1) (a) (i.)). To ascertain what constitutes total dependency, see *Pryce v. Penrikyber Colliery Co.* [2546]. For procedure on an application by dependants, see Workmen's Compensation Rules, 1913, rules 4 and 5. Where the deceased has been in the employment of the same employer for three years next preceding the injury, the sum to be awarded is the amount of the workman's earnings in that employment during those three years, and there is no question of average weekly earnings; thus regard cannot be had to the workman's earnings in any concurrent employment during that period (*Busby or Buckley v. London and India Docks* [2576]). The employment must be continuous for the three years (*Gill v. Fortescue* [2577]). Where the workman has not been in the employment of the same employer during the three years preceding the injury, the amount of compensation is equal to 156 his average weekly earnings during the period of his actual employment by the same employer, in the same grade in which the workman was

at the time of the accident (see Schedule I. (2)). The minimum is £150 (*Lysons v. Knowles* [2300]; *Forrester v. M'Callam* [2578]), and the maximum of £300 also applies (*Russell v. M'Cluskey* [2580]). The minimum of £150 applies even where no work has been actually done (*Leonard v. Baird* [2581]; see also *Doyle v. Beattie and Sons* [2582]). The right of dependants to compensation on the workman's death is a separate and independent right and cannot be released by the workman (*Williams v. Vauxhall Colliery Co.* [2583]), nor will it be terminated by an award terminating the weekly payments during the workman's lifetime (*Jobson v. Cory* [2584]).

Thirdly. Rights of dependants in part dependent (Schedule I. (1) (a) (ii.)). In assessing compensation it is the duty of the arbitrator to look at all the circumstances and say to what extent the claimant was dependent upon the earnings of the deceased. This will involve the consideration of the cost of maintenance of the deceased (*Tamworth Colliery Co., Ltd. v. Hall* [2513]; *O'Neill v. Bansha Co-operative Society* [2586]; see also *Osmond v. Campbell and Harrison* [2587]). The arbitrator may not award compensation without finding whether the dependant was totally or partially dependent (*Cheverton v. Oceanic Steam Navigation Co. (No. 1)* [2588]).

The calculation of the amount due to partial dependants is one of fact (*Littleford v. Connell* [2589]). There is no *minimum*, but the *maximum* is the same as in total dependency. The arbitrator may allow for funeral and medical expenses (*Bevan v. Crawshay* [2590]; *Hughes v. Summerlee Iron Co.* [2591]; *Murray v. Gourlay* [2592]). The last-mentioned case also shows the position of an illegitimate child to whom money has been paid under an affiliation order. Where the applicant is in receipt of parish relief this must be taken into account in fixing the amount of compensation (*Byles v. Pool* [2593]).

Fourthly. Incapacity for Work (Schedule I. (1) (b)). Incapacity for work includes not only physical incapacity to work, but also inability to obtain work, where such inability arises from the injured condition or appearance of the workman (*Ball v. Hunt* [2594]). The question is not whether the incapacity is the natural and probable result of the injury, but whether it in fact resulted from it (*Ystradowen Colliery Co. v. Griffiths* [2595]; *Arnott v. Fife Coal Co. (No. 2)* [2603], and other cases are also inserted on this point). Once it is established that the incapacity has been caused by accident, it makes no difference that a fresh cause may have aggravated the injury (*Brown v. Kent, Ltd.* [2596]). It is the statutory duty of the arbitrator to decide the question of incapacity at the date of the application (*Hall v. Brady* [2600]), and if necessary he must refer the matter to a medical referee (*Huggins v. Guest, Keen and Nettlefolds, Ltd.* [2601]; *Gowan v. Simpson* [2602]).

A workman may still be incapacitated owing to his nervous and mental condition, although he has recovered from the physical and muscular mischief caused by the accident (*Eaves v. Blaenclwydach Colliery* [2613]; *Yates v. South Kirby Collieries* [2614]; *Morris v. Turford and Southward* [2615]; distinguish *Turner v. Brooks* [2617]; *Holt v. Yates and Thom* [2618]; *Higgs and Hill, Ltd. v. Unicorn* [2619]).

If a workman refuses to undergo a reasonable and safe operation

which, in the opinion of professional advisers, offers a reasonable prospect of the removal of the incapacity, he will preclude himself of the right to receive compensation. "In other words, the statutory obligation of the employer to give maintenance during the period of incapacity resulting from an accident, is subject to the implied condition that the workman shall avail himself of such reasonable remedial measures as are within his power." *Per* Lord McLaren in *Donnelly v. Baird* [2620]. If the workman will not undergo such an operation the continuing incapacity is not a consequence of the accident, but a consequence of his own unreasonableness (*Warncken v. Moreland* [2621]). The test is not whether the operation would or would not on the balance of medical evidence have been successful, but whether the workman was or was not acting unreasonably in refusing to undergo it (*Tutton v. S.S. Majestic* [2622]). The *onus* is upon the employer of proving that the continued incapacity is due to the workman's refusal to undergo an operation (*Marshall v. Orient Steam Navigation Co.* [2623]). The question as to whether the refusal of the workman is reasonable or not is one of fact for the arbitrator to decide (*Ruabon Coal Co. v. Thomas* [2624] and a large number of other cases are mentioned on this point). If the incapacity is due to the neglect of medical advice given to the workman, he will not be entitled to compensation (*Dowds v. Bennie* [2633] and other cases are inserted as illustrations of this).

An injured workman who has been taken back by his employers at a proper wage, and subsequently dismissed owing to his own misconduct, will not be entitled to substantial compensation (*Hill v. Ocean Coal Co.* [2638]), yet one act of misconduct does not necessarily deprive him for ever of his right to compensation (*White v. Harris* [2639]; see also *Ward v. Miles* [2640]). The same considerations apply if there is an unreasonable refusal to attempt light work (*Furness, Withy & Co. v. Bennett* [2641]); or if the incapacity is due to idleness (*Upper Forest Tinplate Co. v. Grey* [2642]; *David v. Windsor Steam Coal Co.* [2643]). It has been held that payment should be suspended whilst a workman is in prison (*Clayton and Shuttleworth v. Dobbs* [2644]; but see and consider *M'Nally v. Furness, Withy & Co.* [2646]).

If incapacity still continues from the injury by accident, and a subsequent independent cause of incapacity supervenes (*e.g.*, heart disease), this will not prevent the workman claiming compensation (*Harwood v. Wyken Colliery Co.* [2645]). Thus, a workman who is imprisoned whilst suffering from partial incapacity as a result of an accident will be entitled to compensation (*M'Nally v. Furness, Withy & Co.* [2646]).

The cases are arranged as follows :—

I. Where Death results from the Injury.

II. Dependants wholly Dependent.

(1) Where Workman was with same Employer during three Years preceding Injury.

(2) Where Workman was not with same Employer during three Years preceding Injury.

III. Dependants in part Dependent.

IV. Incapacity for Work.

- (1) General Principles.
- (2) Question whether Incapacity results from Injury is one of Fact.
- (3) Incapacity due to Nervous Effects of Accident.
- (4) Incapacity due to Refusal to undergo Operation.
- (5) Incapacity due to Neglect of Medical Advice.
- (6) Incapacity due to Workman's Misconduct.
- (7) Incapacity from separate causes.

I. *Where Death results from the Injury.*

2560.—**Dunham v. Clare**, [1902] 2 K. B. 292 ; 71 L. J. K. B. 683 ; 86 L. T. 751 ; 50 W. R. 596 ; 66 J. P. 612 ; 18 T. L. R. 645—C. A.

Schedule I., paragraph 1 (a), of the Workmen's Compensation Act, 1897, prescribes a scale of compensation payable to the dependants of a workman "where death results from the injury."

HELD—that the dependants are entitled to compensation on that scale if death results in fact from the injury, even though at the time of the injury it could not be reasonably expected as the probable consequence thereof.

Notes.—*Per* Collins, M.R. : "The question whether death resulted from the injury resolves itself into an inquiry into the chain of causation. If the chain of causation is broken by a *novus actus interveniens*, so that the old cause goes and a new one is substituted for it, that is a new act which gives a fresh origin to the after consequences. . . . The only question to be considered is : Did the death or incapacity in fact result from the injury ? The county court judge by inquiring whether death was the natural and probable consequence of the injury, has applied the wrong standard to the solution of the question. It is quite consistent to say that death resulted from the injury and yet that it was neither the natural nor the probable consequence of it. If no new cause, no *novus actus* intervenes, death has in fact resulted from the injury." See also *Isitt v. Railway Passengers Assurance Co.*, 22 Q. B. D. 504 [1681], and *In re Etherington and the Lancashire and Yorkshire Insurance Co.*, [1909] 1 K. B. 591 [1682].

2561.—**Malone v. Cayzer, Irvine & Co.**, [1908] S. C. 479 ; 45 S. L. R. 351—Ct. of Sess.

The widow of a workman who had committed suicide claimed compensation for his death from his employer. She averred that the deceased, who had already lost the sight of his left eye in the course of his employment, received an injury to his right eye by a splinter of iron penetrating it ; that, as a result of the injury, the sight of that eye began to fail, and eventually he became almost blind ; that owing to the gradual loss of sight in his right eye and consequent blindness, his mind became affected and he became insane and committed suicide, and that his death was due to the accident. The arbitrator dismissed the claim as irrelevant, but the court recalled his determination, and remitted to him to allow a proof.

Notes.—The Lord President in his judgment approved of the observations of Collins, M.R., in *Dunham v. Clare* [2560], and added : "The question is whether causation is or is not made out, and it may be a somewhat uphill matter for the claimant to prove her case. I should like to say that she will have to do something more than say simply that there was a possibility of death arising

from such an injury in such a way—she must show in fact, that it was the result of the injury.”

2562.—Dunnigan v. Cavan and Lind, [1911] S. C. 579 ; 58 Sc. L. R. 459 ; 4 B. W. C. C. 386—Ct. of Sess.

A workman while engaged in laying drain pipes was struck on the back by a stone falling from the surface and was injured. A day or two afterwards he was seen by a doctor, who diagnosed pneumonia and sent him to hospital, where he remained for three days, when he insisted on being taken home. He was accordingly assisted home—a distance of some ten minutes' walk—by some neighbours. This was done in spite of warning by the doctor in attendance at the hospital that such a course was dangerous to life. He died two days afterwards.

In an application by his widow for compensation under the Workmen's Compensation Act, 1906, the sheriff-substitute, acting as arbiter, found that, on a consideration of the whole case, together with the report by a medical referee, “but for the accident the deceased would not have died at the time at which, and in the way in which, he did die,” and that the injury by accident was thus the cause of death.

HELD—that the arbiter had not discharged the duty imposed on him by the Act of considering whether the death did “result” from the injury by accident, and case remitted to him to determine that question and to report.

The sheriff-substitute having reported that he found as a fact that the man's death “resulted” from the accident.

HELD FURTHER—that there was evidence on which the sheriff-substitute might competently find as he did.

Notes.—*Dunham v. Clare* [2560] referred to.

2563.—Golder v. Caledonian Railway (1902), 5 F. 123 ; 40 Sc. L. R. 89—Ct. of Sess.

On February 28th, 1902, a workman who was then affected with nephritis, a disease which was likely to prove fatal to him, though probably not for a few years, received an injury in the course of his employment which so lowered his system that the disease from which he was suffering was accelerated in its operation, and he died on May 8th, 1902.

HELD—that the workman's death resulted from the injury.

Notes.—*Per* The Lord President : “Where, but for the accident, the person would not have died at the time at which, and in the way in which, he did die, the accident must, in my judgment, be held to have been the cause of his death in the sense of the Act.”

Per Lord Kinnear : “The ground of claim is that a man's life has been cut short, when but for the accident he might have been expected to continue in life, and support his family for an indefinite time. That is all that is required.”

2564.—Connell & Co. v. Barr (1904), 116 L. T. J. 127—Ct. of Sess.

HELD—that the fact that the brain, liver, and stomach of a workman were in a diseased state due to chronic alcoholism at the time when he met his death by an accident, was no barrier to his dependants recovering compensation, in respect that if the deceased had not suffered the accident, his physical condition was consistent with his continued existence and capacity for work, and that the accident caused his death at an earlier period than that at which it would probably otherwise have happened.

2565.—Thoburn v. Bedlington Coal Co. (1911), 5 B. W. C. C. 128—C. A.

A workman recovered from the direct effects of an accident, but did not recover his normal health. He eventually died thirteen weeks after the accident from bronchitis following influenza. The county court judge found that death resulted from the injury, as the bronchitis proved fatal owing to the condition to which the accident had reduced the deceased.

HELD—there was evidence to support the finding.

2566.—Southall v. Cheshire County News Co., Ltd. (1912), 5 B. W. C. C. 251; [1912] W. C. Rep. 101—C. A.

A workman was injured in his head by a fall. Traumatic neurasthenia supervened, and gradually became worse. About eight months after the accident he was found drowned in a canal 400 yards from his home. The county court judge found that he committed suicide, and that the suicidal tendency was the result of the accident.

HELD—that there was no evidence to justify the finding.

Notes.—The Master of the Rolls cited the following observation of Lord Atkinson in *Evans & Co., Ltd. v. Astley*, [1911] A. C. 674, at p. 679 [1939], as being applicable to this case: “One not infrequently finds, in cases under this Act, surmises more or less shrewd of this or that arbitrator or judge, or conjectures more or less plausible, described as inferences of fact, although there are no data whatever from which the so-called inference can reasonably be drawn.”

2567.—Shirt v. Calico Printers' Association, [1909] 2 K. B. 51; 78 L. J. K. B. 528; 100 L. T. 740; 53 S. J. 430; 25 T. L. R. 451—C. A.

A workman crushed his hand in such a way that it would in the usual course have been amputated. By a skilful surgical operation, however, the hand was saved; but to prevent it becoming stiff and useless a second operation of grafting new skin on a portion of the hand became necessary. This involved the administration of an anæsthetic under which the man died.

HELD—that the man acted reasonably in undergoing the original operation; that the second operation was only a second stage of the first; and that death arose from the accident.

2568.—Charles v. Walker (1909), 25 T. L. R. 609—C. A.

A workman received an injury in the course of his employment which necessitated the amputation of one of his fingers. He was put under an anæsthetic and the finger was amputated. As he was recovering from the effects of the anæsthetic the surgeons decided to remove a bad tooth of which the workman had complained; further anæsthetics were administered, and an unsuccessful attempt was made to remove the tooth. The workman was then removed to a ward, and shortly afterwards he died. In a claim for compensation by his widow the county court judge held on the evidence that the workman died from failure of respiration caused by the administration of an anæsthetic, that it was at least as probable that his death resulted solely from a spasm induced by an attempt to swallow oozing blood in his mouth as that it resulted from the anæsthetic administered for the first operation, and consequently that the widow had not discharged the *onus* which rested upon her of proving that the workman's death resulted from his injury by the accident. He therefore refused to award compensation under the Workmen's Compensation Act, 1906. The widow appealed.

HELD (dismissing the appeal)—that the county court judge had arrived at a right conclusion.

2569.—Thomson v. Mutter, Howey & Co., [1913] S. C. 619; 50 Sc. L. R. 447; (1913) 1 S. L. T. 213; 6 B. W. C. C. 424; [1913] W. C. & I. Rep. 241—Ct. of Sess.

A workman accidentally ruptured himself in the course of his employment and was obliged to undergo an operation for hernia. In the course of the operation he was discovered to be suffering also from another hernia of long standing, and both hernias were operated upon at the same time. He subsequently died, the cause of death being found to be heart weakness and degeneracy "set up by the strain of the operation." In defence to a claim for compensation the employers maintained that, death being due to an operation part of which only was rendered necessary by the accident, the operation was a *novus actus* intervening to break the chain of causation between the accident and the death.

HELD—that on the facts stated there was evidence to justify the arbitrator in finding that death was the result of the accident the workman had sustained in the course of his employment.

Notes.—**Dunham v. Clare** [2560] applied.

2570.—Euman v. Dalziel & Co. (No. 2), [1913] S. C. 246; 50 Sc. L. R. 137; [1913] W. C. & I. Rep. 49; 6 B. W. C. C. 900—Ct. of Sess.

A workman had a fall from a ladder whereby his ankle was injured, and he also suffered from severe pain and general shock. He was thereafter confined to bed, and although the injury to his ankle improved, he continued to suffer pain and remained in a low state of health, until about a month after the accident he was seized with violent internal pains and died, the cause of death being certified

as appendicitis peritonitis. In an arbitration upon a claim by his widow for compensation, in which two doctors were examined for each side, there was a conflict of medical evidence, one doctor for the claimant being of opinion that it was probable that the workman "would have been alive now had he not met with the accident," the other being of opinion that the condition of which the workman died "was consequent, indirect if you will, of the accident," and that "in all probability" he "would not have died but for the accident." The two doctors examined for the respondents could see no connection between the accident and the cause of death. The arbitrator having found that the death was the result of the accident:

HELD—that there was evidence upon which that judgment could be supported.

Notes.—*Hawkins v. Powells Tillery Steam Coal Co., Ltd.*, [1911] 1 K. B. 988 [1894], applied. *Barnabas v. Bersham Colliery Co.*, 103 L. T. 513 [1893]; *Fenton v. Thorley*, [1903] A. C. 443 [1839]; and *Clover, Clayton & Co., Ltd. v. Hughes*, [1910] A. C. 242 [1879], discussed. *Egerton v. Moore*, [1912] 2 K. B. 308 [2301], referred to. The Lord President adopted the following passage from the judgment of Fletcher Moulton, L.J., in *Hawkins v. Powells Tillery Steam Coal Co., Ltd.*, *supra*: "So far I go with the applicant. But that is not sufficient to establish the case of those who are applying for compensation. They have to prove their case; that is to say, they must show with reasonable clearness that the accident really did come from the employment. Many phrases have been used in this connection, all of them useful, but all of them liable to abuse. Inference is certainly not excluded if it be a legitimate inference. Proof is required, but on the other hand, proof does not mean proof to rigid mathematical demonstration, because that is impossible; it must mean such evidence as would induce a reasonable man to come to the conclusion as a fact that the employment was the cause of death. If that evidence is forthcoming, that is sufficient to establish the applicant's case."

2571.—*Cameron v. Port of London Authority* (1912), 5 B. W. C. C. 416; [1912] W. C. Rep. 305—C. A.

A workman who had met with an accident to his arm was taken to hospital, and afterwards sent home with his arm in splints. The next day he complained to his wife of a pain in his side, and on the following day he went to the hospital, where he was retained as suffering from an acute attack of pneumonia, from which he died. The county court judge found that death did not result from the injury.

HELD—that there could be no appeal as the question was one of fact.

2572.—*Dean v. London and North Western Railway* (1910), 3 B. W. C. C. 351—C. A.

A gasfitter inhaled some gas, and died shortly afterwards from paralysis due to cerebral hæmorrhage. Seven months previously he had had a transient attack of paralysis due to the same cause.

After his death his widow contended that the death was due to gas poisoning, but the county court judge decided that it was not.

HELD—that it was a question of fact for the county court judge.

2573.—Taylorsen v. Framwellgate Coal and Coke Co. (1913), 6 B. W. C. C. 56; [1913] W. C. & I. Rep. 179—C. A.

Where a workman died four years after an accident, and two doctors attributed the death to the accident, and two to other causes, the county court judge, taking into consideration the length of time between the accident and death, found that death did not result from the injury.

HELD—there was no misdirection.

Notes.—*Dunham v. Clare* [2560] referred to.

2574.—Warnock v. Glasgow Iron and Steel Co. (1904), 6 F. 474; 41 Sc. L. R. 359—Ct. of Sess.

The question whether death resulted from or was accelerated by an accident is a question of fact.

2575.—Cleverley and Others (Paupers) v. Gas Light and Coke Co. (1907), 24 T. L. R. 93; 1 B. W. C. C. 82—H. L.

A workman met with an accident, and tumours on the neck ensued. He was incapacitated for work and his employers paid him compensation under an agreement, a memorandum of which was registered. He continued incapacitated and died in a year. His widow claimed compensation, and the county court judge found that his death was not caused or accelerated by the accident, but was due to the disease from which he was suffering, but he held that the employers were estopped from denying that the death was due to the accident by reason of the agreement and the payments made by them.

HELD (by the House of Lords, affirming the decision of the Court of Appeal)—that the agreement did not amount to an admission that the death was caused by the accident and therefore there was no estoppel.

Notes.—Lord Halsbury observed “that the county court was the deciding tribunal on all questions of fact, and the judge had found that the death was not caused by the accident.”

II. Dependants wholly Dependent.

N.B.—To ascertain what constitutes total dependency see *Pryce v. Penrikyber Colliery Co.* [2546].

(1) *Where Workman was with same Employer during Three Years preceding Injury.*

2576.—Busby or Buckley v. London and India Docks (1909), 126 L. T. J. 521; 2 B. W. C. C. 327—C. A.

The amount of compensation payable to the dependants of a

deceased workman who at the date of the injury had been continuously for three years in the employment of the same employer is the amount of the workman's earnings in that employment during those three years, and regard cannot be had to the workman's earnings in any concurrent employment during that period.

2577.—Gill v. N. Fortescue & Sons, Ltd. (1913), 6 B. W. C. C. 577; [1913] W. C. & I. Rep. 471—C. A.

A deceased workman had been employed for three years; 119 weeks by the same employer, then twenty-nine weeks by other employers, and then eight weeks by the first employer, when he was killed by accident. The county court judge computed the average weekly earnings by treating the 119 weeks as continuous employment and dividing the total amount earned during this period by 119 and multiplying the result by 156.

HELD—that there was misdirection, but that, the parties having agreed on the court's suggestion to compute the compensation by multiplying the average earnings of the last eight weeks by 156 and to settle the case on terms, it should not be remitted.

HELD, FURTHER—that where a dependant of a deceased workman waives his claim to compensation, the other dependants are entitled to the whole amount of compensation payable, without deduction of the proportional amount to which the dependant who has waived his claim would have been entitled.

Notes.—*Jones v. Ocean Coal Co.*, [1899] 2 Q. B. 124 [2676]; *Appleby v. Horseley*, [1899] 2 Q. B. 521 [2677]; *Giles v. Belford, Smith & Co.*, [1903] 1 K. B. 843 [2679], applied, as showing that "employment" means continuous employment.

(2) *Where Workman was not with same Employer during Three Years preceding Injury.*

2578.—Forrester v. M'Callam (1901), 3 F. 650; 38 Sc. L. R. 448—Ct. of Sess.

The minimum sum of £150 fixed by paragraph 1 (a) (i.) of the First Schedule to the Workmen's Compensation Act, 1897, as the compensation for a deceased workman's dependants, applies, although the deceased workman has been less than three years in the employment.

Notes.—*Doyle v. Beattie* [2582] reconsidered and disapproved.

2579.—Lysons v. Andrew Knowles & Sons, Ltd. ; Stuart v. Nixon and Bruce, [1901] A. C. 79; 70 L. J. K. B. 170; 84 L. T. 65; 49 W. R. 636; 65 J. P. 388; 17 T. L. R. 156—H. L. (E.).

The right to compensation for injury conferred in general terms by s. 1, sub-s. 1, of the Workmen's Compensation Act, 1897, on workmen to whom the Act applies is not qualified or restricted by Schedule I., paragraph (1) (a) and (b), by which the scale of compensation is based on "average weekly earnings," and it is not a condition precedent to the right, that the workman injured or

killed should have been a fortnight or any other definite period in his employment.

Notes.—*Per* Lord Macnaghten: “Where death results from the injury, and the workman has left dependants, the compensation must be at least £150. It is to be £150, or a sum equal to either the actual amount or the hypothetical amount of his earnings for the three years immediately preceding the accident, not exceeding in any case £300. But if the workman has not served the full period of three years, and if you could not find a basis on which to calculate the hypothetical amount, the compensation would, I think, still be £150.”

Decisions of Court of Appeal in *Lysons' Case*, [1900] 1 Q. B. 780, and *Stuart's Case*, [1900] 2 Q. B. 95, reversed.

2580.—*Russell v. M'Cluskey* (1900), 2 F. 1312; 37 Sc. L. R. 931—Ct. of Sess.

Semble, the maximum of £300 mentioned in the First Schedule to the Workmen's Compensation Act, 1897, as the limit of compensation applies to cases where the deceased workman has been in the employment for less than three years.

Notes.—Decisions of Court of Appeal in *Stuart v. Nixon and Bruce*, [1900] 2 Q. B. 95, and *Lysons v. Andrew Knowles & Sons, Ltd.*, [1900] 1 Q. B. 780, reversed [1901] A. C. 79 [2579], referred to.

2581.—*Leonard v. Baird* (1901), 3 F. 890; 38 Sc. L. R. 649—Ct. of Sess.

A miner was killed after he had descended to work in the pit in which he was employed, but before he had actually commenced to work and before he had earned anything.

HELD—that his widow was entitled to compensation under the Act, and, the average weekly earnings of the deceased being *nil*, that she was entitled to the alternative sum of £150 under the First Schedule of the Act.

Notes.—*Lysons v. Andrew Knowles & Sons, Ltd.* [2579]; *Nelson v. Kerr and Mitchell*, 38 Sc. L. R. 645 [2651], applied. Under the Act of 1906, owing to the shortness of the time during which the workman had been in the employment of his employer, the amount of compensation would be calculated under Schedule I. (2) (a), and the dependants might possibly get more than £150.

2582.—*Doyle v. Beattie & Sons* (1900), 37 Sc. L. R. 915; 2 F. 1166—Ct. of Sess.

A workman at the end of his first week in an employment received injuries, from which he ultimately died, but continued to work in the employment for the week immediately succeeding that in which he received the injuries. Upon his widow claiming compensation, the employers contended that no compensation was due on the ground that it was impossible to ascertain the “average” weekly earnings of the deceased, as he had been in the employment for one week only at the date of the injuries.

HELD—that the earnings of the week succeeding that in which the injuries were sustained fell to be taken into computation, and that the widow was entitled to compensation.

Notes.—The decision in this case was re-considered and disapproved in *Forrester v. M'Callam* [2578]; *Stuart v. Nixon and Bruce*, [1900] 2 Q. B. 95, reversed [1901] A. C. 79 [2579], referred to.

2583.—*Williams v. Vauxhall Colliery Co., Ltd.*, [1907] 2 K. B. 433; 76 L. J. K. B. 854; 97 L. T. 559; 23 T. L. R. 591; 9 B. W. C. C. 120—C. A.

The right of dependants to compensation under the Workmen's Compensation Act, 1897, where death ultimately results from the injury, is a separate and independent right and cannot be released by the workman; but, *semble*, in case of redemption of future weekly payments by the employer under Schedule I., paragraph (13), the amount so paid by way of redemption would properly be deducted from the maximum sum payable to dependants if death afterwards resulted from the injury.

Notes.—See *Howell v. Bradford Corporation*, 4 B. W. C. C. 203 [2146].

2584.—*Jobson v. Cory & Sons, Ltd.* (1911), 4 B. W. C. C. 284—C. A.

A workman was injured and received compensation. A memorandum of agreement to pay compensation was filed, and on an application to review, the payments thereunder were terminated. Upon the man's death his dependants applied for compensation.

HELD—that the award terminating the rights of the workman was no bar to the claim by the dependants.

Notes.—*Howell v. Bradford Corporation*, 4 B. W. C. C. 203 [2146], followed.

2585.—*O'Keefe v. Lovatt* (1901), 18 T. L. R. 57—C. A.

Where an award of a weekly sum had been made to a workman who was injured by an accident, and some months afterwards he died, and his dependants applied for compensation under the Act, claiming three years' wages after giving credit for the weekly payments already made to the workman:

HELD—that there was jurisdiction to entertain the claim.

N.B.—For the effect of the death of a dependant before compensation is paid see *Darlington v. Roscoe* [2551] and cases sub tit. "Dependants."

III. *Dependants in part Dependent.*

N.B.—See *Tamworth Colliery Co. v. Hall* [2513] and cases sub tit. "Dependants," s. 13.

2586.—*O'Neill v. Bansha Co-operative Agricultural and Dairy Society*, [1910] 2 Ir. R. 324; 44 Ir. L. T. 52—C. A. (Ir.).

A. died as the result of an accident arising out of and in the course of his employment with the respondents, with whom he had worked

for a period of six weeks, earning £1 5s. a week, with the prospect of a bonus. For a period of three years prior to his entering the respondents' employment A. had been employed elsewhere at 10s. a week, during which period he resided with his father, the applicant, to whom he paid his wages, and who supported A. out of such wages at a cost of 7s. a week. During his employment with the respondents A. resided alone and supported himself at a cost of 12s. a week, but at the end of three weeks he paid £1 10s. to the applicant, and the latter, after his death, received from the respondents the sum of £2 10s., the balance of A.'s wages then due. The county court judge awarded compensation to the applicant as a partial dependant, calculated at 3s. a week for 150 weeks in respect of A.'s former employment, deducting from A.'s wages of 10s. 3s. for cost of his maintenance, and 10s. a week in respect of his employment with the respondents.

HELD (Cherry, L.J., *diss.*)—that the county court judge, in estimating compensation to the dependant, "reasonable and proportionate to the injury," was entitled to take into consideration the amount of A.'s former earnings, and the proportion thereof expended on his maintenance, and that, as it was not shown that he had misdirected himself, the award should be allowed to stand.

Notes.—*Osmond v. Campbell and Harrison, Ltd.* [2587] discussed. *Main Colliery Co. v. Davies*, [1900] A. C. 358 [2505], cited.

2587.—*Osmond v. Campbell and Harrison, Ltd.*, [1905] 2 K. B. 852; 75 L. J. K. B. 1; 93 L. T. 724; 54 W. R. 117; 22 T. L. R. 4—C. A.

By Schedule I., paragraph (1) (a) (ii.) of the Workmen's Compensation Act, 1897, the amount of compensation under the Act, where death results from the injury and the workman leaves dependants in part dependent upon his earnings at the time of his death, shall be such sum, not exceeding the fixed sum payable under paragraph (1) (a) (i.) in cases of total dependency, as may be determined on arbitration under the Act "to be reasonable and proportionate to the injury to" the dependants. In an arbitration under the Act it was proved that the wages of a deceased workman were 19s. 10½d. a week, and, if he had left dependants wholly dependent upon his earnings, the sum payable under paragraph (1) (a) (i.) would have been £155 0s. 6d. He left a widow, who was at the time of his death earning 1s. 11d. a week by laundry work, and was in part dependent upon his earnings at the time of his death, and the county court judge awarded her £150 (including payments previously made). Upon appeal it was contended for the employers that the county court judge ought to have taken into account the cost of the maintenance of the deceased workman.

HELD—that the mode of calculating the amount of compensation in cases of partial dependency under Schedule I., paragraph (1) (a) (ii.) of the Act, only differs from the mode of calculating it in cases of total dependency under paragraph 1 (a) (i.) by introducing into the calculation the other source or sources of income of the dependant, and that there was nothing to show that the county court judge had misdirected himself as to the mode of assessing the compensation.

Notes.—This case, in so far as it holds that, upon a question of partial dependency, the arbitrator is not entitled to deduct from the earnings of the deceased the cost of his maintenance, is overruled by the decision of the House of Lords in *Tamworth Colliery v. Hall*, [1911] A. C. 665 [2513]. *Main Colliery v. Davies*, [1910] A. C. 358 [2505], cited.

2588.—*Cheverton v. Oceanic Steam Navigation Co., Ltd.* (No. 1) (1913), 6 B. W. C. C. 253—C. A.

The county court judge awarded a dependant £300 compensation without finding whether the dependant was totally or partially dependent.

HELD—the case must be remitted for this to be found.

Notes.—There was a second appeal in this case. See *Cheverton v. Oceanic Steam Navigation Co.* (No. 2) [2555].

2589.—*Littleford v. Connell* (1909), 3 B. W. C. C. 1—C. A.

The amount due to partial dependants is a question of fact in each case.

Notes.—*Osmond v. Campbell and Harrison, Ltd.* [2587] referred to.

2590.—*Bevan v. Crawshay Brothers (Cyfartha), Ltd.*, [1902] 1 K. B. 25; 71 L. J. K. B. 49; 85 L. T. 496; 50 W. R. 98; 18 T. L. R. 17—C. A.

Where a workman, to whom death has been caused in circumstances to which the Workmen's Compensation Act, 1897, applies, leaves dependants in part dependent upon his earnings, the funeral expenses of the workman may be taken into consideration in determining the sum "reasonable and proportionate to the injury" to the dependants directed by the First Schedule to the Act, paragraph (1) (a) (ii.), to be awarded to them as compensation.

2591.—*Hughes v. Summerlee and Mossend Iron and Steel Co.* (1903), 40 Sc. L. R. 602; 5 F. 784—Ct. of Sess.

In fixing compensation under the Act, the arbitrator, in a claim by partial dependants, may take into account the outlays which the claimants have incurred in medical and funeral expenses.

Notes.—*Bevan v. Crawshay Brothers (Cyfartha), Ltd.* [2590] followed. *Fagan v. Murdoch*, 1 F. 1179, doubted, *per* Lord McLaren.

2592.—*Murray v. Gourlay*, [1908] S. C. 769; 45 Sc. L. R. 577—Ct. of Sess.

In a claim for compensation under the Workmen's Compensation Act, 1906, for the death of a workman, the arbitrator found that an illegitimate child of the deceased for whose support the deceased had been paying aliment under a decree of affiliation and aliment, was

partially dependent on his earnings, and that the sum available for compensation under the Act was £150. No other dependant having applied for compensation, the arbitrator awarded the whole sum of £150, less £5 10s. of funeral expenses, to the illegitimate child.

HELD—that the arbitrator had proceeded on a wrong principle, inasmuch as the Act does not provide for the maximum sum being awarded in every case, but only for an award of reasonable compensation within that limit. Case remitted to ascertain the prospective value of the contributions that would probably have been made by the deceased, if he had lived, for the support of his illegitimate child.

Opinion, *per curiam*, reasonable funeral expenses are a proper charge on the fund available for compensation.

Notes.—Lord M'Laren in judgment said: "Now it is evident that the deceased was not a willing contributor to the support of his illegitimate child, because he allowed a decree of affiliation and aliment to go out against him, and no facts are stated which warrant the inference that the deceased would have contributed anything in excess of what he would be compelled by law to pay. . . . I think that in awarding the whole available fund, less funeral expenses, the Sheriff-substitute has proceeded on a wrong principle, because the Act of Parliament does not prescribe that the maximum sum available for compensation should be awarded in every case, but only that reasonable compensation within that limit should be paid."

Main Colliery Co. v. Davies, [1900] A. C. 360 [2505], referred to.

2593.—*Byles v. Pool* (1909), 73 J. P. 104; 53 S. J. 215—County Court.

Where it was shown that an applicant for an award under the Workmen's Compensation Act, 1906, was in receipt of parish relief from the guardians, it was:

HELD—that such source of means and income must be taken into account in fixing the amount of compensation to be awarded.

HELD, FURTHER—that the adoption of the cost of an annuity as a basis of calculation of compensation was erroneous, and not provided for in the Act.

Notes.—*Osmond v. Campbell and Harrison, Ltd.* [2587] referred to.

IV. *Incapacity for Work.*

(1) *General Principles.*

2594.—*Ball v. William Hunt & Sons, Ltd.*, [1912] A. C. 496; 81 L. J. K. B. 782; 106 L. T. 911; 28 T. L. R. 428; 56 S. J. 550; 5 B. W. C. C. 459; 49 Sc. L. R. 711; [1912] W. C. Rep. 261—H. L.

The provisions of Schedule I. to the Workmen's Compensation Act, 1906, as to the scale and conditions of compensation do not cut down the right to compensation conferred by s. 1, sub-s. 1, of the Act.

“Incapacity for work” in paragraph (1)(b) of Schedule I. means loss or diminution of wage-earning capacity and includes inability to get work as the result of the injury which the workman has sustained.

The appellant, an edge tool moulder, met with an accident fifteen years ago through a piece of steel striking his left eye. This accident resulted in the blindness of that eye, but did not produce any disfigurement in the appellant’s appearance. In 1910 the appellant was, while at work, struck in the same eye by a piece of brick, and the eye had to be removed. His power to do work remained as before, but his power to get work was lost or diminished, and he had been refused work on account of his disfigurement. In a claim for compensation under the Workmen’s Compensation Act, 1906 :

HELD—that as the appellant’s inability to obtain work arose as the result of the disfigurement caused by the accident in 1910 he was entitled to compensation under the Act.

Notes.—Earl Loreburn, L.C., in his judgment, said : “In the ordinary and popular meaning which we are to attach to the language of this statute I think there is incapacity for work when a man has a physical defect which makes his labour unsaleable in any market reasonably accessible to him, and there is a partial incapacity for work when such a defect makes his labour saleable for less than it would otherwise fetch.” Lord Atkinson said : “The earning of wages depends as much on the demand for the workman’s labour as it does upon his physical ability to work. If because of his apparent physical defects no one will employ him, however efficient he may be in fact, he has lost the power to earn wages as completely as if he was paralysed in every limb.” *Lysons v. Andrew Knowles & Sons, Ltd.* [2579] followed, as showing that the Schedule cannot be applied to cut down the right conferred by the statute. Lord Shaw of Dunfermline, in a lengthy judgment, in which he reviewed the cases dealing with this question, approved and applied the opinion of Lord Collins in *Shannon v. Holliday*, [1904] 1 K. B. 235 [2769], and the decision in *Cardiff Corporation v. Hall*, [1911] 1 K. B. 1009 [2729], and referred to *Clark v. Gas Light and Coke Co.*, 21 T. L. R. 184 [2712] ; *Radcliffe v. Pacific Steam Navigation Co.*, [1910] 1 K. B. 685 [2773] ; *Celand v. Singer Manufacturing Co.*, 7 F. 975 [2782] ; *Carlin v. Stephen*, [1911] S. C. 901 [2733] ; *Boag v. Lockwood Collieries, Ltd.*, [1910] S. C. 51 ; *Macdonald or Duris v. Wilsons and Clyde Coal Co.*, [1912] A. C. 513 [2770], the last case overruling *Boag’s Case*.

2595.—*Ystradowen Colliery Co. v. Griffiths*, [1909] 2 K. B. 533 ; 78 L. J. K. B. 1044 ; 100 L. T. 869 ; 25 T. L. R. 622—C. A.

Schedule I., paragraph (1) (b) of the Workmen’s Compensation Act, 1906, fixes the amount of the compensation which under s. 1 of the Act an employer is liable to pay to a workman in respect of personal injury by accident arising out of and in the course of his employment where total or partial incapacity for work “results from the injury.” These latter words mean “succeeds as a consequence of the injury,” and not as either the necessary or the natural or probable consequence of the injury, but as the consequence in fact. It need not be the

consequence of the injury alone, but of the injury and something else which would not have existed but for the accident.

In considering questions of this kind it is legitimate and proper to consider not only whether the accident has produced a disease, but also whether it has accelerated an existing tendency to disease in the body.

A roadman employed in a colliery was injured by the fall of a large stone on his right thigh. He fainted, and was subsequently obliged to go to his home, about a mile and a quarter distant. He was assisted part of the way, but had to walk a mile by himself, and it took him two hours to do so. The evening was cold. He contracted a very bad cold. Pneumonia supervened, followed by bronchitis, and he was now suffering from chronic bronchitis, and was unable to work.

HELD (on the question of the right to compensation)—that the test was not whether the man's present condition was the natural result of the injury, but whether it was the result in fact.

Notes.—*Dunham v. Clare* [2560] applied. *Golder v. Caledonian Railway* [2563] referred to.

2596.—*Brown v. Kent, Ltd.*, 82 L. J. K. B. 1039 ; 29 T. L. R. 702 ; 6 B. W. C. C. 745 ; [1913] W. C. & I. Rep. 639—C. A.

A workman met with an accident to his knee in the course of his employment. A slight operation became necessary and was successfully performed, but three or four days later the workman developed scarlet fever. The wound subsequently suppurated, and the knee joint had to be excised, thereby causing incapacity. The medical evidence was that the suppuration might have been caused by the scarlet fever, but that, apart from the accident, it could not have had that effect. On an application by the workman to recover compensation under the Workmen's Compensation Act, 1906:

HELD—that it followed from the medical evidence that the incapacity resulted from the accident.

Once it is established that the incapacity of a workman has been caused by an accident, it makes no difference that a fresh cause, arising casually and uninvited by any special condition of the workman, may have aggravated the injury resulting from the accident and contributed to the incapacity.

Notes.—*Dunham v. Clare* [2560] ; *Ystradowen Colliery Co. v. Griffiths* [2595], referred to.

2597.—*Lee v. Baird*, [1908] S. C. 905 ; 45 Sc. L. R. 717—Ct. of Sess.

A miner, whose right eye was sound, but whose left eye was affected by disease, was able to work underground. In the course of his employment he met with an accident to his sound eye, which so injured it as to render it of little use. Owing to the condition of the diseased eye he was thereafter unable to resume his work underground. It was proved that the condition of the diseased eye was neither caused nor aggravated by the accident.

HELD—that the workman was suffering from incapacity resulting from the accident.

2598.—*Martin v. Barnett* (1910), 3 B. W. C. C. 146.

A carman who ten years previously had injured his eye so much that he could only perceive hand movements in front of it, was struck in the same eye by his horse's tail. Inflammation set in, and the eye had to be removed. The county court judge awarded compensation on the ground that his incapacity was caused by the second injury.

HELD—that the decision of the county court judge was correct.

2599.—*Wilkinson v. Frodingham Iron and Steel Co., Ltd.* (1913), 6 B. W. C. C. 200; [1913] W. C. & I. Rep. 335—C. A.

A workman was permanently injured. His employers paid him compensation for some time, and then gave him light work. He had another accident, and had to give up the light work. The employers paid further compensation for some months, and then stopped. The county court judge found that the man was as well as he had been when he was working at the light work previously, and terminated the payments.

HELD—that the case must be remitted to decide what incapacity remained from the original injury.

2600.—*R. & H. Hall, Ltd. v. Brady*, [1913] W. C. & I. Rep. 706; 47 Ir. L. T. R. 211—C. A. (Ir.).

On an application by the employers that compensation previously awarded to the workman should be discontinued, the Recorder of Belfast found that the workman would be fit for ordinary work in a month, and made an award that, on the undertaking of the employers to give him light work for a month at the old rate of wages, the compensation should cease from the date of the order, the workman to be at liberty to apply during the month as to the character of the light work to be provided.

HELD—that the order should be returned to the Recorder with a direction that if at the date of the application he found that the man was suffering from partial incapacity he should award such compensation as was provided by the Act; but if he was of opinion that the man had quite recovered the application should be dealt with accordingly.

2601.—*Huggins v. Guest, Keen and Nettlefolds, Ltd.*, [1913] W. C. & I. Rep. 191; 6 B. W. C. C. 80—C. A.

A workman employed in certain ironworks was injured by fire in 1907, and on recovery from total disablement was subsequently given light work by the same employers at a slightly higher wage. In 1912 the works were closed temporarily, and on the resumption of work the employers declined to take the workman back into their employment except at the old work he did prior to the accident,

which he refused, and evidence was given that he was now incapable of doing any but light work. He claimed compensation for the accident suffered in 1907.

HELD—that upon a conflict of evidence as to whether his present incapacity was caused by the accident, the arbitrator was justified in referring the question to the medical referee, and upon his report declining to award compensation to the workman.

2602.—Cowan v. Simpson (1909), 3 B. W. C. C. 4—C. A.

On an application by the employer for a review of an award, the county court judge found that the workman honestly believed and acted upon advice given him by two competent doctors, whose *bona fides* was unimpeached, that he was unfit to do the work offered to him by the employer. The employer's doctors said he could do the work. The judge stated that owing to the conflict of medical testimony, he was unable to come to a satisfactory opinion as to whether or not the workman was or was not able to do this offered work, and made his award in favour of the workman.

HELD—that the case must be remitted to the judge, calling in a medical referee if necessary to decide the question of the workman's capacity, this being his statutory duty.

(2) *Question whether Incapacity results from Injury is one of Fact.*

2603.—Arnott v. Fife Coal Co., Ltd. (No. 2), [1912] S. C. 1262 ; [1912] W. C. & I. Rep. 355 ; 49 Sc. L. R. 902 ; 6 B. W. C. C. 281—Ct. of Sess.

A miner who had sustained an injury to his eye was paid compensation down to a certain date, when, on the report of the medical referee that he was as fit as any other one-eyed man to resume his work underground, the arbiter terminated the compensation. On appeal, the court recalled the determination of the arbiter and allowed a proof. Thereafter the arbiter found in fact that the claimant had not since the date of the accident worked underground, that he had made various applications for such work without success, that whereas before the accident his wages were upwards of £2 a week, he was now able to earn only 18s. a week, and dismissed the application for review.

HELD—that the question as to the workman's wage-earning capacity was one of fact on which the arbiter's decision was final.

2604.—Anderson v. Darngavil Coal Co., [1910] S. C. 456 ; 47 Sc. L. R. 342—Ct. of Sess.

The employers of a miner, who had suffered an injury to his knee and had been in receipt of compensation, stopped further payments on April 9th, 1909, on the ground that he had completely recovered. The question of his recovery being in dispute was referred to a medical referee, who reported that the knee should be kept unbandaged, and that after continuing for a month at light labour he should resume his

original work. The workman ceased wearing a bandage, but, a fortnight thereafter, his knee again required to be bandaged by a doctor, and after one day's absence he resumed light work and continued to wear a bandage. In an application by the workman for continued compensation, the sheriff found, on July 22nd, 1909, "that the appellant, if he wears a kneecap, will be able and ought to resume his original work as a brusher," and awarded him partial compensation up to August, 1909, and ended the compensation as from that date. On appeal by the workman against the ending of compensation, the court refused to interfere with the sheriff's finding, holding that the question of the workman's recovery was one of fact only, upon which the sheriff's finding was final.

2605.—Cunningham v. M'Naughton and Sinclair, [1910] S. C. 980 ; 47 Sc. L. R. 781 ; 3 B. W. C. C. 576—Ct. of Sess.

The employers of a workman, whose duties occasionally necessitated his climbing a ladder, and who had suffered injuries and had been in receipt of compensation, stopped the payments, and applied to have the compensation ended or reduced on the ground, which was disputed, that the workman had recovered. After a proof before the sheriff and a medical assessor, the sheriff found that the workman was "fit to resume his former work," or "to undertake any other form of labour which is conducted on the level of the ground," but that "in the meantime, it would not be entirely safe for him to climb ladders, . . . as from want of use, combined with the effect of the accident, the appellant's left leg is weaker than the right," and ended the compensation. The workman appealed on the ground that from the sheriff's findings it was obvious that the workman had not recovered from the effect of the accident, and that the sheriff was not justified in ending the compensation. The court refused to interfere with the decision, holding that the question of the workman's recovery was one of fact only upon which the sheriff's finding was final.

Notes.—*Anderson v. Darngavil Coal Co.* [2604] followed. This case also decided a point arising under Schedule II. (9) (see [2925]).

2606.—Goodall and Clarke v. Kramer (1910), 3 B. W. C. C. 315—C. A.

A workman injured one finger in July, 1909, and compensation was paid under a registered agreement. On November 26th, 1909, the workman admitted to the employers' doctor that he was able to work, but on January 17th, 1910, when the employers applied to terminate the agreement, the tip of the finger was still slightly tender. The arbitrator terminated the compensation.

HELD—that the decision was on a question of fact, and there was evidence to support it; and that it was not a proper case for a suspensory award.

2607.—Rayman v. Fields (No. 2) (1910), 3 B. W. C. C. 123—C. A.

The question whether incapacity has resulted from the injury is one of fact.

2608.—Roberts v. Benham (1910), 3 B. W. C. C. 430—C. A.

A workman injured his hand and four months later said that he was still incapacitated. The judge found that the man was shamming.

HELD—there was evidence to support the decision.

2609.—Wells v. Cardiff Steam Coal Collieries, Ltd. (1909), 3 B. W. C. C. 104—C. A.

Upon a conflict of medical evidence as to whether a workman who had been injured by accident was fit for work, the case was referred to a medical referee, who reported that the man was fit for full work, but more liable to strains than before the accident. The judge, on this report, made an award of a penny a week.

HELD—the question was one of fact, and that there was evidence to justify the award.

2610.—Price v. Burnyeat, Brown & Co. (1907), 2 B. W. C. C. 337—C. A.

A workman who had been injured four years previously alleged that he was still unfit for light work. The arbitrator found, as a fact, that he was exaggerating, and that he was fit for light work.

HELD—there was evidence to justify the finding.

2611.—Binns v. Kearley and Tonge, Ltd. (1913), 6 B. W. C. C. 608 ; [1913] W. C. & I. Rep. 760—C. A.

A boy employed as a printer met with injury by accident to his finger, causing incapacity, for which the employer paid him compensation for some weeks. A month after payments had ceased, he applied for an award, alleging continuing incapacity. There was uncontradicted medical evidence that he had completely recovered and was fit to work. The county court judge, however, found that incapacity was still continuing, and made an award in the boy's favour. A fortnight after the award the boy secured work at higher wages than he had previously earned.

HELD (Kennedy, L.J., *diss.*)—that there was no evidence to support the finding.

2612.—Taylor v. Bolekow, Vaughan & Co., Ltd. (1911), 5 B. W. C. C. 130—C. A.

A workman with degenerate arteries, whose work was very heavy, fell out of a railway truck on to his head on the line. He resumed work in three days, but shortly afterwards became incapacitated again, and was found suffering from an aneurism. He claimed compensation on the ground that the accident had caused or accelerated the aneurism. The judge found that the accident had accelerated the aneurism, basing his finding on the fact, as he said, that a swelling, a symptom of the aneurism, had appeared within four weeks of the accident. In truth, the only evidence as to the swelling was that it

appeared seven weeks after the accident, and there was no evidence that the aneurism had been in existence at the time of the accident.

HELD—the judge had misdirected himself and the case must be reheard.

(3) *Incapacity due to Nervous effects of Accident.*

2613.—Eaves v. Blaenclwydach Colliery Co., Ltd., [1909] 2 K. B. 73; 78 L. J. K. B. 809; 100 L. T. R. 751; 5 B. W. C. C. 329—C. A.

On an application by an employer under the Workmen's Compensation Act, 1906, Schedule I. (16), to have the weekly payments reviewed, the nervous and mental as well as the physical condition of the injured workman must be taken into consideration in estimating the extent of his recovery and consequent earning capacity. It is not sufficient for the employer to show that the muscular and physical mischief caused by the accident has come to an end.

2614.—Yates v. South Kirkby, Featherstone, and Hemsworth Collieries (1910), 79 L. J. K. B. 1035; [1910] 2 K. B. 538; 103 L. T. 170; 26 T. L. R. 596—C. A.

A collier, as the consequence of going to the assistance of an injured fellow-workman, who died shortly afterwards, suffered a nervous shock producing a physiological state which incapacitated him from doing his ordinary work as a collier.

HELD—that this was an accident arising out of and in the course of his employment and entitling him to compensation under the Workmen's Compensation Act, 1906.

Notes.—*Eaves v. Blaenclwydach Colliery Co., Ltd.* [2613] applied. *Clover, Clayton & Co. v. Hughes*, [1910] A. C. 242 [1879]; *Pugh v. London, Brighton and South Coast Railway*, [1896] 2 Q. B. 248 [1678], cited. In his judgment in this case Farwell, L.J., said that in his opinion "nervous shock due to accident which causes personal incapacity to work is as much 'personal injury by accident' as a broken leg."

2615.—Morris v. Turford and Southward, [1913] W. C. & I. Rep. 502; 6 B. W. C. C. 606—C. A.

On September 26th, 1911, a workman met with an accident in the course of his employment. His employers paid him compensation for three weeks, when he returned to work and continued at work for five weeks, when he was discharged. Thereafter, until March 13th, 1913, when he first made his claim for compensation, he was attended at intervals by doctors and was for three months in hospital. He was admittedly unfit for work. The county court judge found that he was suffering from neurasthenia, the result of the accident, and awarded him compensation under s. 1 of the Workmen's Compensation Act, 1906.

HELD—that there was evidence to justify the finding of the county court judge.

2616.—Ogden v. South Kirkby, Featherstone, and Hemsworth Collieries, Ltd., [1913] W. C. & I. Rep. 463; 6 B. W. C. C. 573—C. A.

A workman was injured in 1905 and was paid compensation until January 4th, 1908, when the compensation was reduced to 1*d.* a week. Subsequently there had been various applications for review, as a result of which the compensation was increased for a time and then reduced again to 1*d.* a week. On February 3rd, 1913, the workman again applied for a review and increase of the compensation. There was a conflict of medical testimony. The doctors called for the workman were of opinion that the man was suffering from traumatic neurasthenia. The doctors on the other side were of opinion that the workman was a conscious malingerer.

HELD—that there was evidence to support the finding of the county court judge that the man was a conscious malingerer.

2617.—Turner v. Brooks and Doxey, Ltd. (1909), 3 B. W. C. C. 22—C. A.

The county court judge found that an injured workman, after returning to his employment for eighteen months, had refused to continue it, partly from nervousness, but partly from reasons unconnected with his physical condition. The judge further found (1) that the refusal to continue work was due to nervousness, which an average reasonable man could overcome; and (2) that the nervousness was the result of the accident.

HELD—that, looking at the whole of the judgment, the judge meant to find that the man was able to work, and that he was right in holding that compensation was no longer due.

Notes.—*Eaves v. Blaenclwydach Colliery Co., Ltd.* [2613], distinguished.

2618.—Holt v. Yates and Thom (1910), 3 B. W. C. C. 75—C. A.

On an application to review and increase a nominal award, the two medical referees of the court reported that the workman, who had been injured by an admitted accident, was, as regards his physical condition, able to resume his usual occupation as a moulder. As to his mental condition, they reported that he had brooded so much over his accident that his mind would not allow him to summon up courage to persevere at his usual work.

HELD—that the county court judge was right in finding that the man was not suffering from any incapacity from work which resulted from the injury, but that his inability to work was caused by brooding over the effects of the accident, and that this was not incapacity within the Act.

2619.—Higgs and Hill, Ltd. v. Unicum, [1913] 1 K. B. 595; 82 L. J. K. B. 369; [1913] W. C. & I. Rep. 263; 108 L. T. 169; 6 B. W. C. C. 205—C. A.

A bricklayer met with an accident in the course of his employment and was in receipt of compensation for some years. In September,

1912, he was offered light work, but refused it, and his own doctor then certified that he was incapable of continuous work of any sort. Thereupon the employers commenced proceedings, asking, first, for the diminution and, secondly, for the termination of the compensation. Both applications came on for hearing together. There was a serious conflict of medical testimony, but the employers' medical evidence was that the workman had no physical disability which would prevent him doing light work or beginning work as a bricklayer, but was merely suffering from weakness of will and a fixed but erroneous idea that he was a chronic invalid. The county court judge terminated the compensation. He found that the workman had been offered light work which he had unreasonably refused; that an average man suffering as the workman did would long ago have gone back to work; and that, acting on unwise medical advice, the man had behaved in an unreasonable manner. He did not think the man was a malingerer, and he agreed with the medical referee who reported that the employers' medical evidence gave the correct view of the man's condition, and that a continuance of compensation was likely to keep up that condition.

HELD (Cozens-Hardy, M.R., *diss.*)—that on these findings the county court judge was justified in terminating the compensation.

Per Cozens-Hardy, M.R.: "The county court judge ought to have reduced the compensation to 1*d.* a week so as to allow the conflicting opinions of the doctors to be subjected to the test of actual experiment.

Per Hamilton, L.J.: "There is no fixed rule that a man acting on the advice of his doctor cannot be held to have acted unreasonably."

Notes.—*Turner v. Brooks and Dowe, Ltd.* [2617], and *Tutton v. S.S. Majestic (Owners)* [2622] referred to. See also *New Monckton Collieries, Ltd. v. Toone* [2721].

(4) *Incapacity due to Refusal to undergo Operation.*

2620.—*Donnelly v. Baird*, [1908] S. C. 536; 45 Sc. L. R. 394—Ct. of Sess.

Employers applied for the review of a weekly payment which was being made to a workman who had been totally incapacitated in consequence of an injury to his left hand. It was proved that the loss of the use of the left hand was caused by the removal of the third finger and the top of the thumb, the existence of pain in the palm, and the permanent curvature of the second finger into the palm; that three doctors who had examined the workman recommended that the second finger should be removed and that a nodule in the palm which they believed to be the source of the pain should also be removed; that the proposed operations were simple or minor operations, not attended with appreciable risk or serious pain, and were likely to restore to the workman in large measure, or altogether, the use of his hand for the purpose of his former work; that the workman refused to undergo the operations; and that "his continued incapacity to use his left hand and any continued pain in his left palm are fairly attributable to the want of such operations."

HELD (Lord Stormonth Darling and Lord Pearson *diss.*)—that

the workman, by refusing to undergo the operations, had precluded himself from any right to receive further compensation.

Notes.—In this case the question of the right of a workman to refuse to undergo an operation was discussed at length. *Per* the Lord Justice-Clerk: "I think the sound view on this matter is well expressed by Lord Adam in the case of *Dowds v. Bennie*, 5 F. 268 [2633], when he laid it down that a workman who has been incapacitated is not bound in every case to submit to any medical or surgical treatment that is proposed, under penalty if he refuses, of forfeiture of his right to a weekly payment—*e.g.*, in the case where a serious surgical operation is proposed with more or less probability of a successful cure. On the other hand, I hold it to be the duty of an injured workman to submit to such treatment, medical or surgical, as involves no serious risk or suffering, such an operation as a man of ordinary manly character would undergo for his own good, in a case where no question of compensation due by another existed. In preparing this opinion, I find I have used almost the terms which are to be found in the case of *Anderson v. Baird*, 5 F. 373 [2626]. These two cases which I have referred to seem to me to practically rule this case."

Per Lord M'Laren: "In view of the great diversity of cases raising this question, I can see no general principle except this, that if the operation is not attended with danger to life or health, or extraordinary suffering, and if according to the best medical or surgical opinion the operation offers a reasonable prospect of restoration or relief from the incapacity from which the workman is suffering, then he must either submit to the operation or release his employers from the obligation to maintain him. In other words, the statutory obligation of the employer to give maintenance during the period of incapacity resulting from an accident, is subject to the implied condition that the workman shall avail himself of such reasonable remedial measures as are within his power."

2621.—*Warneken v. Moreland & Son*, [1909] 1 K. B. 184; 78 L. J. K. B. 332; 100 L. T. 12; 25 T. L. R. 129—C. A.

Where an injury has occurred in the course of his employment to a workman, causing an incapacity for work which might be removed by a simple surgical operation involving no serious risk, and of such a nature that any reasonable man in his own interest would undergo it, the continuance of the incapacity is due to the workman's unreasonable refusal to undergo the operation and not to the original accident. In such a case the workman cannot obtain continued compensation for the injury from his employer under the Workmen's Compensation Act, 1906.

Notes.—*Rothwell v. Davies* [2629] explained and distinguished. *Donnelly v. Baird* [2620] followed, and the judgment of Lord M'Laren in that case adopted. Fletcher Moulton, L.J., said: "The distinction is between being reasonable and not being reasonable; and I think that the case of *Rothwell v. Davies* [2629], on account of the very imperfect report which it has received, has led to a misapprehension of the view of the Court of Appeal on this point.

In *Rothwell v. Davies* it now appears there was a finding that it was reasonable for the workman not to undergo the operation, and, therefore, the Court of Appeal held the appeal could not be supported."

2622.—*Tutton v. S.S. Majestic (Owners)*, [1909] 2 K. B. 54; 78 L. J. K. B. 530; 100 L. T. 644; 53 S. J. 447; 25 T. L. R. 482—C. A.

A workman is not acting unreasonably in refusing to undergo an operation on his own doctor's honest advice based on the view that the administration of an anæsthetic would be dangerous to life owing to the workman's state of health. The test in such a case is not whether the operation would or would not on the balance of medical evidence have been successful, but whether the workman was or was not acting unreasonably in refusing to undergo it.

Notes.—*Warncken v. Moreland & Son* [2621] distinguished. *Rothwell v. Davies* [2629] referred to.

2623.—*Marshall v. Orient Steam Navigation Co.*, [1910] 1 K. B. 79; 79 L. J. K. B. 204; 101 L. T. 584; 54 S. J. 64; 26 T. L. R. 70—C. A.

A fireman in the course of his employment on a steamship burnt his right hand, with the result that his fingers were blistered. A blister on one finger broke, and septic matter got into the wound. The ship's doctor suggested a slight operation, which the man refused to undergo. About a fortnight later the man was discharged, and his finger had shortly afterwards to be amputated. He claimed compensation under the Workmen's Compensation Act, 1906. The evidence of a medical man who saw him on his discharge was that the finger would not have been saved by the suggested operation. The ship's doctor, however, stated that the operation would have cured the finger. The county court judge found that the man's refusal to submit to the operation was unreasonable, but in view of the conflict of medical testimony he considered that it was impossible to say whether the operation would have saved the finger or not, and he made an award in favour of the applicant.

HELD—that the burden was upon the employers to break the chain of causation and to show that the loss of the finger was due, not to the accident, but to the unreasonable refusal to undergo the operation; that there was evidence which entitled the county court judge to say that the burden of proof had not been discharged, and that therefore the award of compensation was good.

Notes.—*Warncken v. Moreland & Son* [2621] and *Tutton v. S.S. Majestic (Owners)* [2622], explained and applied.

2624.—*Ruabon Coal Co. v. Thomas* (1909), 3 B. W. C. C. 32—C. A.

A workman, after being for some long period in receipt of compensation, refused to undergo an operation. On an application to review, the employers' doctors were unanimous as to the advisability and as

to the strong probability of the success of the suggested operation. The workman called two doctors, whose opinions disagreed.

HELD—that the finding of the county court judge that this workman was not unreasonable, was a fact which could not be upset on appeal.

2625.—O'Neill v. John Brown & Co., [1913] S. C. 653; [1913] W. C. & I. Rep. 235; 50 Sc. L. R. 450; 6 B. W. C. C. 428—Ct. of Sess.

A workman accidentally injured in the foot, and thereby incapacitated, refused to undergo a simple operation which it was reasonably certain would have cured him. In so refusing he acted on the advice of his own doctors, who were of opinion that the proposed operation, though devoid of danger, would be useless. In an application for review of a payment of compensation which he was receiving :

HELD—that he was precluded by his refusal from claiming a continuance of the compensation.

Notes.—In this case Lord Guthrie said: "I assume that the only possible cure of this man's foot is by the proposed operation. Now the cases show that that is not conclusive. . . . In the first place, if a medical man, on his behalf, thinks, as apparently, in *Sweeney v. Pumpherston Oil Co.* [2628], Professor Annandale did, that a cure could be effected without an operation, then the refusal to undergo the operation might not be unreasonable. In the second place, as appears from *Tutton v. S.S. Majestic (Owners)* [2622], if the cure can only be effected at the cost of substantial risk or substantial suffering, then again the workman's refusal is not considered unreasonable. Here we have neither of these elements. Nobody says that there is any other way of restoring this man from total incapacity to complete recovery except by operation; and all the medical men agree that there is neither substantial risk nor prospect of substantial suffering. It seems to me that in ordinary life the appellant would be considered unreasonable by reasonable people."

2626.—Anderson v. Baird (1903), 5 F. 373; 40 Sc. L. R. 263—Ct. of Sess.

A workman became entitled to compensation under the Act in consequence of an injury he received to one of his thumbs on April 18th, 1901, and his employers began to pay him compensation voluntarily. Shortly after the accident part of the thumb was amputated, and in June, 1901, a further operation was performed. The workman, having continued to be incapacitated for his ordinary work, was advised to undergo a third operation, but refused. His employers stopped paying compensation to him. It appeared that the third operation "would in all probability remove the sensitiveness of the injured part and enable the workman to earn wages as before or at least to earn more than he is able to do now," and "that the operation so advised is a simple operation, not attended with serious risk or pain and is such as a reasonable man not claiming compensa-

tion or damages would for his own advantage and comfort elect to undergo."

HELD (Lord Young *diss.*)—that the workman's refusal to undergo the operation disentitled him in the circumstances to a continuance of substantial compensation, and he was ordered a penny a week until the further order of the court.

2627.—Evans v. Cory Brothers & Co., Ltd. (1912), 5 B. W. C. C. 272; [1912] W. C. Rep. 199.—C. A.

A collier having ruptured himself tried to continue work with a truss, but could not. His doctor advised him to undergo an operation as soon as there was a bed ready for him in the hospital, and until then not to continue his work. The man did no work at all during that time, and claimed compensation in respect thereof. The county court judge found that the man acted reasonably upon the advice of his doctor, and awarded full compensation.

HELD—that the case must go back to decide what the man was able to earn at any other work.

2628.—Sweeney v. Pumpherston Oil Co. (1903), 5 F. 972; 40 Sc. L. R. 721—Ct. of Sess.

A workman who had sustained injury to his right elbow, which disabled him from work, and who had been paid compensation by his employers for more than a year, was then examined by two surgeons on their behalf, who advised that he should undergo an operation for the removal of a piece of the elbow-bone which prevented the free use of the arm. The workman refused, and the payments were discontinued. On an application thereafter to assess compensation the arbitrator found "that the operation (1) is an important minor operation, (2) is not in the nature of an experiment, but is established in surgical practice; (3) has been attended with complete success in all similar cases (five in number) regarding which evidence was led before me; (4) is not attended by any appreciable risk; (5) will in all probability within two months, or a little longer, restore to the [workman] the use of his right arm, and enable him to earn wages as before; and (6) is such as a reasonable man not claiming compensation or damage would, for his own advantage and comfort, elect to undergo"; he accordingly refused to award compensation. It was stated at the hearing of the appeal, and not disputed, that an eminent surgeon, who had not been a witness before the arbitrator, had examined the workman after, as well as before the arbitration and was of opinion that the workman should not undergo the operation proposed.

HELD (on the facts)—that the workman was not bound to submit to the operation, and that his refusal to do so did not disentitle him to compensation.

HELD ALSO—that the court was entitled to take into consideration the facts admitted at the bar, which showed that the workman's refusal was reasonable.

Notes.—Per Lord M'Laren: "Now without weighing the evidence

of the one surgeon against the other, I think that in a balanced state of medical or surgical opinion it would be hard to say that the workman is to lose his right of compensation because he does not make a selection between those two opinions such as the employer would approve." *Dowds v. Bennie* [2633] and *Anderson v. Baird* [2626] distinguished.

2629.—*Rothwell v. Davies* (1903), 19 T. L. R. 423—C. A.

A workman who was receiving a weekly payment of compensation under the Workmen's Compensation Act, 1897, was requested by his employer to submit to a surgical operation, which, upon the evidence, would probably be successful, but which would be attended with a certain amount of risk. The workman refused, and the employer applied that the weekly payments might be reviewed and diminished.

HELD—that the workman was not bound to submit to the operation, and that the application was rightly refused.

Notes.—The report of this case is imperfect; see the note to *Warncken v. Moreland & Son* [2621].

2630.—*Humber Towing Co., Ltd. v. Barclay* (1911), 5 B. W. C. C. 142—C. A.

A workman's forearm was broken by accident. He had it set by a bonesetter, who did the work so negligently that there was vicious union, the bones being united, but overlapping and at a bad angle, preventing use of the wrist. The man being for this reason still incapacitated, the employers requested him to have the arm broken again and reset. This he refused. The employers applied for review, on the ground that the incapacity was no longer due to the injury, but either to the workman's unreasonable refusal of operation, or to the negligence of the bonesetter. The county court judge found that the workman's refusal was reasonable, and, without deciding the point as to the negligence of the bonesetter, dismissed the application.

HELD—that this point should be decided and that there must be a rehearing.

2631.—*Paddington Borough Council v. Stack* (1909), 2 B. W. C. C. 402—C. A.

The refusal by a workman to undergo an operation must be reasonable, or he will not be entitled to continue to receive compensation from his employers under the Act.

2632.—*O'Neill v. Ropner & Co.* (1908), 43 Ir. L. T. 2; 2 B. W. C. C. 334—C. A. (Ir.).

A workman was injured by a heavy weight falling on his little finger, and an operation was performed with a view to straightening the finger, but without success. It was considered that the best thing to do would be to amputate the finger and thus restore grasping power to the hand, but the workman refused to undergo the second

operation. Full payment under the Act had been made from the time of the accident down to the time when such refusal was notified. On hearing of the application it was contended by the employers that they were not liable as from the date of such refusal, inasmuch as the incapacity to work was not due to the injury, but to the applicant's refusal to undergo reasonable surgical treatment.

HELD (without deciding the question of fact)—that the award of compensation had been rightly made, and that the proper way in which to bring the employers' contention forward was on an application to vary.

(5) *Incapacity due to Neglect of Medical Advice.*

2633.—Dowds v. Bennie (1902), 5 F. 268; 40 Sc. L. R. 239—Ct. of Sess.

An employer held not bound to continue weekly payments to an injured workman where the continuance of his incapacity was due to his neglect to comply with certain simple medical directions which had been given to him.

Notes.—This case is also inserted on another point (see [2969]). *Per Lord Adam*: "A workman who has been incapacitated by an accident is not bound in every case to submit to any medical or surgical treatment that is proposed, under the penalty, if he refuses, of forfeiting his right to a weekly payment—*e.g.*, in a case where a serious surgical operation is proposed with more or less probability of a successful cure. . . . But that is not the kind of case we have to deal with. In this particular case the injury was comparatively slight, and the treatment proposed simple and common and brought within his reach, and the benefit which would have resulted therefrom, not doubtful, and I think it was such treatment that any reasonable man would have adopted it."

2634.—Burgess & Co., Ltd. v. Jewell (1911), 4 B. W. C. C. 145—C. A.

A workman had the tip of his little finger amputated, after an accident. The wound healed, leaving slight adhesions. After paying compensation for some time, the employers applied for a review. Shortly before the hearing the workman, acting on his doctor's advice, had a further amputation of the finger. The county court judge held that the man was fit for work, and that the persistence of the adhesions was due to his unreasonable refusal to resume work, which would have soon broken them down, and reduced the payments to 1*d.* per week.

HELD—that there was no evidence to support the findings of the county court judge.

Notes.—Cozens-Hardy, M.R., pointed out that the man ought to have been told that there were two courses open to him either to go back to work and at the cost of great pain break down the adhesions, or to submit to a second operation. The Master of the Rolls went on to say: "If those two alternatives had been put before him, and the man said, 'I will do neither one nor the other,' it would have

been very natural, and, I think, very right, possibly, for the learned county court judge to have held that the man had acted so unreasonably in refusing to take either of these two courses that his continued disability was not due to the accident, but was due to his refusal."

2635.—*Steele v. Bilham* (1910), 128 L. T. J. 416—County Court.

A charwoman was injured by a needle penetrating her right hand. It appeared from the medical evidence that the woman would have regained the use of her hand if she had exercised her fingers.

HELD—that the woman had acted unreasonably in not exercising her fingers, and that she was not entitled to compensation.

Notes.—*Warnken v. Moreland & Son* [2621]; *Tutton v. S.S. Majestic (Owners)* [2622]; *Marshall v. Orient Steam Navigation Co.* [2623] applied.

2636.—*Moss & Co. v. Akers* (1911), 4 B. W. C. C. 294—C. A.

A workman who had injured his hand was advised by his doctor that he could not recover the use of it, but the employer's doctor advised that he would recover if he exercised it. He did not exercise it, and his employers applied for a review. The county court judge held that the man had not behaved unreasonably.

HELD—that the question was one of fact, and there was evidence to support the finding.

2637.—*Smith v. Coed Talon Colliery, Ltd.* (1900), *Times*, February 6th, 1900; 2 W. C. C. 121.

The question whether present incapacity for work results from the injury or from neglect of medical advice is a question of fact.

(6) *Incapacity due to Workman's Misconduct.*

2638.—*Hill v. Ocean Coal Co., Ltd.* (1909), 3 B. W. C. C. 29—C. A.

A workman was partially incapacitated by an accident, and the injury was permanent, but his employers found him work in another capacity at a higher wage than that at which they had employed him before the accident. From this employment he was dismissed by reason of his own misconduct. The workman took proceedings for compensation under the Act from the employers, but the county court judge made his award in favour of the employers, on the ground that the workman's incapacity was due to his own misconduct. The workman had asked for substantial compensation and did not ask for a suspensory award of 1*d.* a week.

HELD—that the workman was at present able to earn in some suitable employment the same wages as formerly, and was out of work through his own misconduct, and that as on the hearing the employers offered to submit to an award of 1*d.* a week, an order to that effect should be made.

Notes.—*Clarke v. Gas Light and Coke Co.* (1905), 21 T. L. R. 184 2712], considered.

2639.—W. White & Sons v. Harris (1910), 4 B. W. C. C. 39—C. A.

By an accident a workman lost the use of his left eye. His employers, under a registered agreement, paid him 10s. 6d. a week during incapacity. He resumed work at his former rate of wages, but was subsequently dismissed for alleged misconduct. On application by the employers to review the agreement, the county court judge reduced the weekly payments to 1d., on the ground that the workman had brought about his own dismissal.

HELD—that though, when a workman employed at an adequate wage vacates his position by reason of his own misconduct, he is not entitled at once to call upon his employer for compensation, yet one act of misconduct does not necessarily deprive him for ever of the right to compensation.

2640.—Ward v. Miles (1911), 4 B. W. C. C. 182—C. A.

A waitress had an injury to her finger, which, becoming stiff, prevented her from working as efficiently as before. She received compensation for some time, and then returned to her old work at her old wages. She could not work as well as before, and her employers complained of her clumsiness. She left work of her own accord and claimed compensation. The county court judge found that she could not work as well as before, and that she was therefore partially incapacitated, and entitled to compensation.

HELD—there was evidence to support the finding.

2641.—Furness, Withy & Co. v. Bennett (1910), 3 B. W. C. C. 195—C. A.

An injured workman was paid compensation for sixty-one weeks by his employers. Subsequently the employers offered the workman light work, which he refused without attempting to do it. The county court judge held that the workman had acted unreasonably in refusing to go and see what the work offered was, and that, if he had accepted the offer and returned to work, by the arbitration he would have been under no disability. He therefore stopped compensation, but made a declaration of liability.

HELD—that the decision was on a question of fact, and that there was evidence to support it.

2642.—Upper Forest and Worcester Steel and Tinplate Co., Ltd. v. Grey (1910), 3 B. W. C. C. 424—C. A.

The judge, who sat with a medical assessor, came to the conclusion that a workman who had been disabled would have recovered if he had taken proper exercise, and that his present condition was due to long-continued idleness.

HELD—that there was evidence to support the decision.

2643.—David v. Windsor Steam Coal Co. (1911), 4 B. W. C. C. 177—C. A.

The county court judge found that a collier who had been injured, was unfit for heavy work, but that his incapacity was due not to the accident, but to prolonged idleness.

HELD—there was evidence to support the finding.

2644.—Clayton and Shuttleworth, Ltd. v. Dobbs (1908), 2 B. W. C. C. 488—County Court.

Where a workman had been sentenced and imprisoned for nine months, the county court judge suspended the payment of compensation, on the ground that his incapacity to earn wages during that period was not due to the accident.

Notes.—See and consider *McNally v. Furness, Withy & Co.* [2646].

(7) *Incapacity from Separate Causes.*

2645.—Harwood v. Wyken Colliery Co., [1913] 2 K. B. 158; 82 L. J. K. B. 414; [1913] W. C. & I. Rep. 317; 108 L. T. 282; 57 S. J. 300; 29 T. L. R. 290; 6 B. W. C. C. 225—C. A.

A workman met with an accident in the course of his employment. His employers admitted liability and paid him a weekly compensation by arrangement with him and not under the Workmen's Compensation Act, 1906. On May 20th, 1912, they stopped payment of the compensation on the advice of doctors who reported that the workman was suffering from heart disease. On July 5th, 1912, the workman commenced arbitration proceedings claiming compensation from May 20th, 1912. The county court judge found that the heart disease was not caused by the accident; that the workman was suffering from partial incapacity for work caused by two things—by the accident and also by the heart disease, each cause operating independently of the other; and that there was no work which the accident prevented him from doing which the heart disease did not also prevent him from doing. On these findings:

HELD—that as the incapacity caused by the accident still continued, the workman, notwithstanding the subsequently supervening cause of incapacity, was entitled to compensation under s. 1, sub-s. 1, of the Workmen's Compensation Act, 1906.

Notes.—*Per Cozens-Hardy, M.R.*: "If the employer proves that the man has completely recovered from the effects of the accident, has been cured, an application for compensation must fail. The date of the application is the critical date. But where the man has not completely recovered, has not been cured, I think it is not necessary for him to establish that his present incapacity is due solely to the accident." *Per Buckley, L.J.*: "In a sentence, my conclusion is that while the compensation is only for the continuing consequences of the injury measured by diminished capacity to earn wages, still a subsequent supervening cause leaves the consequence of that

diminished capacity still existent and only adds a further diminished capacity." *M'Callum v. Quinn*, [1909] S. C. 227 [2818]; *Ball v. William Hunt & Sons* [2594], referred to.

2646.—*McNally v. Furness, Withy & Co.*, [1913] W. C. & I. Rep. 717; 29 T. L. R. 678; 6 B. W. C. C. 664—C. A.

A workman who had met with an accident in the course of his employment, and was in receipt of £1 a week compensation from his employers, was convicted of stealing and sentenced to eighteen months' imprisonment with hard labour. The employers stopped payment. The workman claimed compensation. He was still suffering from partial incapacity for work as the result of his accident.

HELD—that, as the incapacity caused by the accident still continued, the workman, notwithstanding his imprisonment, was entitled to compensation under s. 1, sub-s. 1, of the Workmen's Compensation Act, 1906.

Notes.—*Harwood v. Wyken Colliery Co.* [2645] applied. Cozens-Hardy, M.R., in referring to that case said: "That was a case, in my opinion, of very great importance, and in which this court deliberately laid down a principle which I should be very sorry in any way to be supposed to be departing from. . . . It seems to me that *Harwood v. Wyken Colliery Co.*, which I am bound to assume, in this case at all events, to be right, governs the principle in the present case, and if you find as a fact, as the learned county court judge has found as a fact, that the man, when examined in his present residence, which happens to be Wormwood Scrubbs, is now suffering partial disability by reason of what happened when engaged in the employers' work, the employers' liability is not affected by reason of what supervenes, namely, that the man cannot get out of prison now to try to work. The test is not what wages he actually earns, but what, having regard to his physical capacity, he is capable of earning."

“ EARNINGS ” AND “ AVERAGE WEEKLY EARNINGS.”

Schedule I., paragraph (2).—For the purposes of the provisions of this schedule relating to “ earnings ” and “ average weekly earnings ” of a workman, the following rules shall be observed :—

- (a) Average weekly earnings shall be computed in such manner as is best calculated to give the rate per week at which the workman was being remunerated. Provided that where by reason of the shortness of the time during which the workman has been in the employment of his employer, or the casual nature of the employment, or the terms of the employment, it is impracticable at the date of the accident to compute the rate of remuneration, regard may be had to the average weekly amount which, during the twelve months previous to the accident, was being earned by a person in the same grade employed at the same work by the same employer, or, if there is no person so employed, by a person in the same grade employed in the same class of employment and in the same district ;
- (b) where the workman had entered into concurrent contracts of service with two or more employers under which he worked at one time for one such employer and at another time for another such employer, his average weekly earnings shall be computed as if his earnings under all such contracts were earnings in the employment of the employer for whom he was working at the time of the accident ;
- (c) employment by the same employer shall be taken to mean employment by the same employer in the grade in which the workman was employed at the time of the accident, uninterrupted by absence from work due to illness or any other unavoidable cause ;
- (d) where the employer has been accustomed to pay to the workman a sum to cover any special expenses entailed on him by the nature of his employment, the sum so paid shall not be reckoned as part of the earnings.

“Earnings” and “Average Weekly Earnings.”

Firstly, as to the meaning of the term “earnings.” “Earnings” comprise whatever the workman receives in return for his services, and thus include not merely wages, but incidental advantages derived from his employment: such as food and clothing (*Great Northern Railway v. Dawson* [2647]). Things not capable of being estimated in money, such as the value of tuition received by an apprentice, are too vague to be included in the expression “earnings” (*Pomphrey v. Southwark Press* [2648]; see also *Rosenqvist v. Bowring* [2649]). Under the 1897 Act, “earnings” were held to mean “gross earnings,” and so no deduction could be made for tools or other necessary equipment of a workman, for the supply of which he had been called upon to pay his employer (*Abram Coal Co. v. Southern* [2650]; see also *Nelson v. Kerr and Mitchell* [2651] and *Houghton v. Sutton Heath and Lea Green Colliery Co.* [2652]). In the recent decision under the present Act of *Shipp v. Frodingham Iron Co.* [2653] the last mentioned cases were distinguished, and it was held that where workmen worked in a gang, the average weekly earnings of each workman, computed on the footing of Schedule I. (2) (a), were his aliquot share of the net earnings of the gang.

Paragraph (2) (d) expressly provides that the payment by the employer to a workman of a sum to cover any special expenses entailed on him by the nature of his employment is not to be reckoned as part of his earnings (see *Midland Railway v. Sharpe* [2654] and *M’Kee v. Stein* [2655]). It is not always necessary that the “earnings” should come from the employer, for if it is an implied term of the contract of service that the workman should be allowed to retain advantages derived from other persons, e.g., “tips” or gratuities, such advantages must be taken into account when estimating the average weekly earnings of the workman (*Penn v. Spiers and Pond* [2656]; *Knott v. Tingle Jacobs* [2657]).

Secondly, as to the meaning of the term “average weekly earnings.” This may be gathered from the judgments in *Perry v. Wright*, *Bailey v. Kenworthy*, and the other cases which were considered by the Court of Appeal in [1908] 1 K. B., at p. 441 [2658]. It is necessary to remember when considering this question that the dominant principle contained in paragraph (2) (a) is that the average must be computed in such manner “as is best calculated to give the rate per week at which the workman was being remunerated” (*per* Cozens-Hardy, M.R., in *Perry v. Wright* [2658]). In an ordinary case the average weekly earnings of a workman are to be ascertained by dividing the total amount earned during the relevant period of his employment by the number of weeks actually worked within that period, and if there are regularly recurring trade holidays, when no work can be done, by deducting from the result thus obtained a fraction equal to the fraction of the year during which for this reason no wages can be earned (*Carter v. Lang* [2659]). For practical illustrations of these principles see the headnote to *Anslow v. Cannock Chase Colliery* [2660] and *White v. Wiseman* [2661]. *Turner v. Port of London Authority* [2662] and other recent decisions are also included on this point.

Thirdly, the meaning of the term "grade." The term "grade" refers to the particular rank occupied by the workman, as, for instance, whether he is a mason, or a bricklayer, or a bricklayer's labourer, and not to his greater or less excellence in that rank (*Perry v. Wright* [2658]). The effect of clause (c) of paragraph (2) would appear to be that a change in the grade of employment has the same effect as a break in the employment (*Babcock and Wilcox v. Young* [2667]). "Any step up or down from one grade to another is to be regarded as commencing a fresh employment" (*per Cozens-Hardy, M.R.*, in *Perry v. Wright* [2658]). . . . "Having found that the man has a particular grade, and what are the average wages in that grade, there is no obligation to adopt those average wages as the basis of compensation. The personal element then comes in. It will be still open to consider whether the individual workman is an average man or is above or below the average man" (*per Cozens-Hardy, M.R.*, in *Perry v. Wright* [2658]).

A temporary change in the nature of a workman's employment does not change his grade of employment (*Jury v. Owners of S.S. Atlanta* [2668]), nor does a change in wages necessarily import a change of grade; but if it accompanies a change of department, or a change of the class of machine, and is not temporary, it will amount to a change of grade (*Dagleish v. Edinburgh Roperies Co.* [2669] see also judgment of Fletcher Moulton, L.J., in *Perry v. Wright* [2658]). There may be distinct grades of casual labourers in the employment of the same employer (*Barnett v. Port of London Authority* (No. 1) [2670]). "The wages earned at the date of the accident cannot be the sole test" (*per Cozens-Hardy, M.R.*, in *Perry v. Wright* [2658]). Thus, if a workman employed in one capacity meets his death whilst temporarily employed in another capacity the arbitrator will be justified in taking into account his earnings in both capacities (*Dobson v. British Oil and Cake Mills* [2671]; *Edge v. Gorton* [2672]).

Fourthly, employment by the same employer. Except in the case where the workman has entered into concurrent contracts of service (see *Simmons v. Heath Laundry* [2463]) in calculating the compensation payable, regard may only be had to the period of employment by the same employer (*Hunter v. Baird* [2673]; *Williams v. Poulson* [2674]). Such employment means continuous employment, and if there is a break in the employment, wages earned prior to the break must not be taken into consideration (*Williams v. Wynnstay Collieries, Ltd.* [2675]). *Jones v. Ocean Coal Co.* [2676] and several other decisions under the Act of 1897 are included on this point. They are now of little value, as their effect has been incorporated in Schedule I. (2). See also *Perry v. Wright* [2658] on this point.

The cases are divided as follows:—

I. "Earnings."

II. "Average Weekly Earnings."

III. "Grade."

IV. Employment by the same Employer.

I. "*Earnings*."

2647.—*Great Northern Railway v. Dawson*, [1905] 1 K. B. 331; 74 L. J. K. B. 271; 92 L. T. 145; 53 W. R. 309; 21 T. L. R. 193—C. A.

A railway guard, in addition to his wages, was supplied by the railway company with a complete uniform each year. The property in the uniform remained in the railway company.

HELD—that the value of the use of the uniform was part of the guard's "earnings" within the meaning of clause (1) of the First Schedule to the Workmen's Compensation Act, 1897.

2648.—*Pomphrey v. Southwark Press*, [1901] 1 K. B. 86; 70 L. J. K. B. 48; 83 L. T. 468; 65 J. P. 148; 17 T. L. R. 53—C. A.

Per A. L. Smith, M.R.: "Loss of tuition by an apprentice is not the subject of compensation under the Act."

Per Stirling, L.J.: "The value of the tuition received by an apprentice during his apprenticeship is too vague to be included in the expression 'earnings' in clause (2) of the First Schedule to the Workmen's Compensation Act, 1897."

Semble, incidental advantages derived from his employment and capable of being estimated in money, such as food, clothing, or a house rent free, may be included in the workman's earnings.

Notes.—*Irons v. Davis*, [1899] 2 Q. B. 330 [2701], and *Chandler v. Smith*, [1899] 2 Q. B. 506 [2139], followed. *Noel v. Redruth Foundry*, [1896] 1 Q. B. 453 [3248], referred to.

2649.—*Rosenqvist v. Bowring & Co., Ltd.*, [1908] 2 K. B. 108; 77 L. J. K. B. 545; 98 L. T. 773; 24 T. L. R. 504—C. A.

On a claim for compensation by a seaman who received a weekly sum in cash in addition to his board and lodging on board ship:

HELD—that, in calculating the value of the seaman's board and lodging so as to arrive at his average weekly earnings, the cost of the board and lodging to the shipowners was the only practical test.

Per Cozens-Hardy, M.R.: "To guard myself against any misunderstanding, I should add that I do not mean to assert that as a general rule the cost to the employer is always or necessarily the value to the workman. I can conceive many cases in which the cost to the employer would be a wholly insufficient and inadequate test. I gave one in the course of the argument as an illustration, the case of a farmer who boards some of his workmen in the farmhouse; it may be perfectly true that in such a case the cost to the farmer of the board would be less than the cost which the workman would have to incur if he had to get his board outside the farmhouse. But the peculiarity of the present case is that there is no possibility of competition."

Notes.—*Dothie v. Macandrew*, [1908] 1 K. B. 803 [2444], referred to. See also *MacGillivray v. Northern Counties Institute for the Blind*, [1911] S. C. 897 [2501].

2650.—*Abram Coal Co. v. Southern*, [1903] A. C. 306 ; 72 L. J. K. B. 691 ; 89 L. T. 103 ; 19 T. L. R. 579—H. L. (E.)

In calculating the amount of compensation due under the Workmen's Compensation Act, 1897, in respect of an accident to the workman no deduction should be made for tools or other necessary equipment of a workman, for the supply of which he has been called upon to pay his employer.

Notes.—*Houghton v. Sutton Heath and Lea Green Colliery Co.* [2652] approved.

2651.—*Nelson v. Kerr and Mitchell* (1901), 3 F. 893 ; 38 Sc. L. R. 645—Ct. of Sess.

A miner who was paid according to his output employed his son as an assistant in his work, but paid him nothing for his services. The usual wage for such assistance was 2s. 9d. per day. The miner having been injured in the course of his employment claimed compensation.

HELD—that in estimating his average weekly earnings nothing fell to be deducted in respect of the gratuitous assistance given by the son.

Notes.—*Lysons v. Andrew Knowles*, [1901] A. C. 79 [2579] applied.

2652.—*Houghton v. Sutton Heath and Lea Green Colliery Co.*, [1901] 1 K. B. 93 ; 70 L. J. K. B. 61 ; 83 L. T. 472 ; 49 W. R. 196 ; 65 J. P. 134 ; 17 T. L. R. 54—C. A.

“ Earnings ” in Schedule I., clause (1) (a) (i.), of the Workmen's Compensation Act, 1897, means the actual amount, whether in money or in kind, which the workman receives from his employers.

The average weekly earnings of a miner, who suffered injury from an accident in the course of his employment which resulted in his death, were £1 10s. 11d. a week, but a deduction of 6d. a week was made for oil supplied by his employers for the lamp used by the miner in his employment, so that the average amount of money actually received by him from his employers was £1 10s. 5d. only.

HELD (in assessing compensation to the miner's dependants under the Workmen's Compensation Act, 1897)—that the compensation must be computed upon the basis that the miner's average weekly earnings were £1 10s. 11d. a week.

2653.—*Shipp v. Frodingham Iron and Steel Co.*, [1913] 1 K. B. 577 ; 82 L. J. K. B. 273 ; [1913] W. C. & I. Rep. 230 ; 108 L. T. 55 ; 57 S. J. 264 ; 29 T. L. R. 215 ; 6 B. W. C. C. 1—C. A.

A workman employed by a company worked in a gang. The gang was paid a certain rate per ton of stone raised, the powder

necessary to raise it being supplied to the gang by the company at cost price. The head of the gang received the net sum due after the cost of the powder had been deducted, and distributed it among the members of the gang according to the number of hours each had worked and not according to the amount of stone raised or powder used by each. The average weekly sum actually received by the workman was £1 6s. 2d. The average cost per man per week of the powder was 3s.

HELD—that the workman's average weekly earnings, computed on the footing of Schedule I. (2) (a) of the Workmen's Compensation Act, 1906, were his aliquot share of the net earnings of the gang—namely, £1 6s. 2d.

Quære, whether a sum deducted from a definite wage to an individual workman would be considered a sum paid to cover any special expense within Schedule I. (2) (d).

Notes.—*Abram Coal Co. v. Southern* [2650]; *Houghton v. Sutton Heath and Lea Green Colliery Co.* [2652]; *M'Kee v. John G. Stein & Co.* [2655] distinguished. *Midland Railway v. Sharpe* [2654] referred to.

2654.—*Midland Railway v. Sharpe*, [1904] A. C. 349; 73 L. J. K. B. 666; 91 L. T. 181; 53 W. R. 114; 20 T. L. R. 546—H. L. (E.)

A goods guard, in the employment of a railway company, who had frequently in the course of his duty to lodge away from home, was under the terms of his employment entitled, when he did so, to receive a specified money allowance for board and lodging, the object of the allowance being to cover the guard's out-of-pocket expenses, and its amount about equal to the reasonable cost of board and lodging. No inquiry was ever made as to the actual expenses incurred by the guard, and the guard was entitled to the allowance even although he lodged and boarded with a friend without any expense to himself.

HELD—that the allowance, being a payment to which the guard was entitled on the happening of certain events, whether he had incurred any expenses or not, came within the meaning of the word "earnings" in clause (1) (a) (i.) of the First Schedule to the Workmen's Compensation Act, 1897.

Notes.—This case is in effect overruled by Schedule I. (2) (d) of the present Act.

2655.—*M'Kee (or Ferguson) v. John G. Stein & Co.*, [1910] S. C. 38; 47 Sc. L. R. 39; 3 B. W. C. C. 544—Ct. of Sess.

A miner was in the habit of purchasing the explosives which he required for his work from his employers, and the price of these was retained by them from his wages. He employed a drawer whom he himself paid out of his wages.

HELD—(1) that it had been authoritatively settled by decisions prior to the Workmen's Compensation Act, 1906, that in estimating a miner's earnings for the purposes of compensation his wages must be

taken at their full rate, without deducting the cost of explosives paid for by him.

(2) That in the present case the cost of explosives did not represent a sum paid to the miner "to cover any special expenses" in the sense of the Workmen's Compensation Act, 1906: and therefore,

(3) That the miner was entitled to compensation on the full rate of wages.

HELD FURTHER—that in determining the average weekly earnings of the deceased there should be deducted from his gross wages the amount of wages paid by him to his drawer.

Notes.—*Abram Coal Co. v. Southern* [2650] and *Midland Railway v. Sharpe* [2654] followed. *Houghton v. Sutton Heath and Lea Green Colliery Co.* [2652] referred to.

2656.—*Penn v. Spiers and Pond, Ltd.*, [1908] 1 K. B. 766; 77 L. J. K. B. 542; 98 L. T. 541; 24 T. L. R. 354; 52 S. J. 280—C. A.

The measure of compensation under the Workmen's Compensation Act, 1906, is not wages, but "earnings in the employment," which need not always come only from the employer.

Where the employment is of such a nature that the habitual giving and receipt of gratuities or "tips" is open and notorious and sanctioned by the employer, the money thus received by the servant with the knowledge and approval of the employer ought to be brought into account in estimating the average weekly earnings of the servant. It is not necessary to prove that it was an express condition of the employment that the servant should be allowed to retain the "tips" in addition to his wages; but it is sufficient if the court finds that it was an implied term of the contract, and that both parties contracted on that footing.

"Tips," therefore, received by a deceased servant, who was employed as a waiter on a restaurant car and met with a fatal accident, are part of his earnings in and by virtue of his employment, and must be taken into consideration in estimating the compensation payable to his dependant.

Notes.—Cozens-Hardy, M.R., in his judgment said: "To avoid misconception, we desire to state that nothing in this judgment extends to 'tips' or gratuities (a) which are illicit; (b) which involve or encourage a neglect or breach of duty on the part of the recipient to his employer; or (c) which are casual and sporadic and trivial in amount."

2657.—*Knott v. Tingle Jacobs & Co.* (1910), 4 B. W. C. C. 55—C. A.

In calculating a workman's average weekly earnings, where the evidence is that he habitually received certain tips to the knowledge of his employers, the county court judge is entitled to take them into consideration, even though such tips are given for services outside his ordinary employment.

Notes.—*Penn v. Spiers and Pond, Ltd.* [2656], applied. See also [2443] and [2708].

II. "*Average Weekly Earnings.*"

2658.—*Perry v. Wright, Cain v. Leyland & Co., Bailey v. Kenworthy, Ltd., Gough v. Crawshay Brothers, Cyfartha, Ltd.*, [1908] 1 K. B. 441; 77 L. J. K. B. 236; 98 L. T. 327; 24 T. L. R. 186—C. A.

The "average weekly earnings" of a workman are by Schedule I., s. (2) (a) of the Workmen's Compensation Act, 1906, to "be computed in such manner as is best calculated to give the rate per week at which the workman was being remunerated." Where exact computation of his normal rate of remuneration is "impracticable" an estimate must be made as nearly as possible, and "regard may be had to the average weekly amount which, during the twelve months previous to the accident, was being earned by a person in the same grade employed at the same work by the same employer, or, if there is no person so employed, by a person in the same grade employed in the same class of employment, and in the same district."

The word "grade" here refers to the particular rank occupied by the workman, as, for instance, whether he is a mason, or a bricklayer, or a bricklayer's labourer, and not to his greater or less excellence in that rank. And possibly a workman may not belong to any definite grade. Even if he does, there is no obligation to accept those average wages as the basis of compensation. The personal qualities of the workman may be considered, especially where the work is piecework.

The wages earned at the date of the accident cannot be the sole test. The object aimed at is to estimate the "normal" rate of remuneration of the injured workman.

Days on which no work is done and no wages are earned must be disregarded, except in the one case provided by s. 1 (a).

In calculating any of the periods mentioned in s. 1, absence from illness or any other unavoidable cause is to be disregarded, and the employment is to be reckoned as continuous, unless the workman has been discharged on the ground of such absence, etc., and subsequently re-engaged.

Employment means employment in the same grade.

Basis of calculation for average weekly earnings discussed generally.

Per Cozens-Hardy, M.R. : "Now it is obvious that s. 1, construed by itself, deals with the ordinary case of a workman employed by only one employer, and for a sufficient period to enable his 'earnings,' or his 'average earnings' to be computed with mathematical accuracy. It does not contemplate concurrent contracts of service, or employment which in its nature is casual. For some reason, which is not obvious, three years is the standard period in case of death, whereas twelve months is the standard period in case of partial incapacity, but in either case provision is made for taking an average for any less period. The actual history of the workman furnishes adequate material in ordinary circumstances. Sect. 2 contemplates circumstances which, though not uncommon, may be deemed out of the ordinary course. It lays down certain rules which must be observed wherever 'earnings' or 'average weekly earnings' occur in the schedule. The dominant principle is to be found in the first sentence of clause (a). 'Average weekly earnings shall be computed in such

manner as is best calculated to give the rate per week at which the workman was being remunerated.' This can scarcely be confined to one date, namely, the date of the accident ; for, under s. 1 (a) and (b), it is clear that other dates cannot be disregarded. Then follows a proviso which contemplates that there may be cases in which computation is impracticable. No mandatory words are there used ; the phrase is simply, 'regard may be had.' The sentence is not grammatical, but I think the meaning is this : Where you cannot compute you must estimate, as best as you can, the rate per week at which the workman was being remunerated, and to assist you in making an estimate you may have regard to analogous cases. Whether the task is 'impracticable' must be decided as at the date of the accident. This may be due to deaths, loss of books, or other circumstances. The rate of remuneration may have to be ascertained or estimated, not merely at the date of the accident, but during some earlier period. For example, a collier who has been for twelve months employed in a colliery whose books have been all burnt, is entitled under s. 1 (b) to compensation based upon his average weekly earnings during that period. It cannot be that the proviso has no operation in such a case. The analogous cases referred to in the proviso by way of guides are the average weekly amount which during the twelve months previous to the accident was being earned by a person in the same grade employed at the same work by the same employer, or, if there is no person so employed, by a person in the same grade employed in the same class of employment and in the same district.

"This language is borrowed from s. 3 of the Employers' Liability Act, 1880. I am not aware that the word 'grade' in this connection has ever been interpreted. I think it refers to the particular rank in the industrial hierarchy occupied by the workman, such as shepherd, carter or common labourer on a farm, or mason or bricklayer, or bricklayer's labourer in the building trade, and not to his greater or less excellence in that rank. It is a question of fact whether there is any 'grade' to which the workman belongs, and it is likewise a question of fact what is the average weekly amount earned in any particular grade. If there is no grade, an estimate must nevertheless be made. The section primarily contemplates highly organised industries, but it is impossible to limit the Act to such industries.

"Having found that the man has a particular grade, and what are the average wages in that grade, there is no obligation to adopt those average wages as the basis of compensation. The personal element then comes in. It will still be open to consider whether the individual workman is an average man or is above or below an average man. This must be so where men in a particular grade are employed on piece work. You cannot reject evidence of the skill and efficiency of the individual workman. Where payment is at so much per hour for every man in a particular grade, the skill and efficiency of the individual may perhaps be disregarded, though I am not prepared to say that the age and the habits of the individual may not have such an influence upon his chance of employment as to deserve consideration. The wages earned at the date of the accident cannot be the sole test. Such a test would operate most unfairly, sometimes for and sometimes against the workman. There are many employments in which work

is more plentiful and wages are higher at some seasons of the year, than in other seasons. For example, the wages of agricultural labourers are higher during harvest. In all cases in which accurate mathematical computation is impracticable, the object aimed at should be to estimate what I may call the normal rate of remuneration of the injured man. This is the main overriding idea, and to this idea every doubtful suggestion must yield. Days in which no work is done and no wages are earned must be disregarded, except in the one case provided for in s. 1 (a).

"Sect. 2 (b) deals with the case where a workman works for several employers under concurrent contracts of service, and adds together all his earnings for the purpose of charging the employer at the time of the accident, who has to pay compensation on that footing.

"Sect. 2 (c) defines 'employment by the same employer.' Its language is very obscure, but I understand it to mean this: Any step up or step down from one grade to another is to be regarded as commencing a fresh employment. But in calculating any of the periods mentioned in s. 1 you are to disregard absence due to illness or to causes beyond the control of the workman, and to reckon the employment as continuous, notwithstanding any such absence. This will be only a presumption which may be rebutted by evidence that the workman was in fact discharged on the ground of such absence and subsequently re-engaged."

Per Fletcher-Moulton, L.J.: "In my opinion, therefore, the term 'average weekly earnings' signifies broadly the average earnings which the workman would make in a normal week if employed on the terms prevailing before and up to the time of the accident.

"That the above is a fair interpretation of the phrase 'average weekly earnings' as used in the schedule appears to me to follow from the rule laid down in the first words of s. 2 (a), namely, 'average weekly earnings shall be computed in such manner as is best calculated to give the rate per week at which the workman was being remunerated.' This rule expresses, to my mind, the dominant note of this part of the schedule. It imposes on the Court the duty of ascertaining what remuneration the workman would receive in a normal week in the employment in which he was engaged at the time of the accident, and gives it freedom to do so in the manner best calculated to arrive at a fair result. And I cannot find anything in the schedule which modifies this duty or takes away this freedom. It is intended that the 'average weekly earnings' should be a real, and not an artificial, estimate of what rate of remuneration the workman might fairly be held to be enjoying at the date of the accident.

"But when we examine the schedule in order to find the context in which the phrase 'average weekly earnings' is used in defining or giving a basis for the estimation of the compensation to be paid to the workman (namely, in the latter part of s. 1 (a), and s. 1 (b)), we find that it is qualified by the limitation 'during the period of his employment by the same employer,' or equivalent words. To interpret these words, we must refer to s. 2 (c). It is there provided that 'employment by the same employer shall be taken to mean employment by the same employer in the grade in which the workman was employed at the time of the accident.' This makes it clear

that in taking the average we are restricted to the period during which the workman has been employed in the same grade. If, therefore, he has been promoted by the employer to a higher grade and is in this grade at the time of the accident, his earnings when in his lower grade are not to be taken into consideration in obtaining the average which is to give his 'average weekly earnings.' I must not be understood as saying that an increase of wages will necessarily have the effect of excluding from the calculation of this average the weeks in which the lower rate of wages has obtained, because a man's wages may rise or fall without any change of grade taking place. But if there has been a change of grade, they must be so excluded. For instance, if any ordinary seaman has been promoted to be an able-bodied seaman, and continues in that grade, up to the date of the accident, s. 2 (c) excludes from the calculation of his average weekly earnings the period during which he has been an ordinary seaman.

"This rule will suffice for the majority of cases. But it may be that the circumstances existing at the date of the accident and during the period immediately before it (defined in the way I have just described), may not furnish adequate material to enable a fair average to be arrived at. The schedule deals with such cases by the provisions to be found in the latter part of s. 2 (a). It will be observed that up to this point we have been dealing, as is natural, exclusively with matters personal to the particular workman, and probably without the existence of special provisions in that behalf a Court would feel itself confined to such matters in admitting evidence for the purpose of estimating his average weekly earnings. But the provisions of the latter part of s. 2 (a) empower the Court, in cases where the shortness of the time during which the workman has been in the employment of his employer, or the casual nature of his employment, or the terms of the employment, render it impracticable to compute the rate of remuneration at the date of the accident, to resort for assistance in estimating that rate to matters relating to workmen of the same grade employed at the same work by the same employer, or even, should this fail, to persons in the same grade employed in the same class of employment in the same district. These provisions do not appear to me to show any intention on the part of the Legislature to depart from the fundamental principles with which I have dealt. Their object is only to give greater freedom to the Courts in the admission of evidence in cases where the ordinary modes of computing the average weekly earnings fail; and here, again, they seem to permit or prescribe the same process which would be ordinarily followed in practice by sensible men. But this extraneous assistance is to be treated by the Court only as help. 'Regard may be had to' it. In other words (to use the phrase employed by Farwell, L.J., in the course of the argument of one of the cases before us), the facts which the Courts may thus take cognizance of are to be 'a guide and not a fetter.'

"One point of great importance in the interpretation of these provisions remains to be decided, namely, whether in an ordinary case the average weekly earnings are to be calculated by dividing the total earnings during the relevant period by the number of weeks in that period or by the number of weeks actually worked within that

period. For instance, if the workman has been in the employment of the same employer prior to the accident for fifteen weeks, in which period there have been holidays amounting to one week or to two half-weeks, or in which he has been absent from work for a week, is the totality of his earnings during that period to be divided by 15 or 14?

"This question has, I confess, given me great difficulty, and I cannot say that the words of the Act leave it free from doubt. But, as I have said, the dominant note is, in my opinion, the provision that the 'average weekly earnings shall be computed in such manner as is best calculated to give the rate per week at which the workman was being remunerated,' and in this difficulty I ask myself which of the two methods 'is best calculated to give the rate per week at which the workman was being remunerated.' Now, if a person who is in the receipt of £2 per week, chooses not to go to work during a particular week, and therefore does not receive any remuneration for it, it does not alter the fact that the rate at which he was being remunerated was £2 a week. I have, therefore, come to the conclusion that in the case to which I have referred the divisor is to be the number of weeks worked, namely, fourteen. But I should arrive at a different conclusion if the limitation to the time worked arose from the nature of the employment itself. Let me take, for example, a person who is employed by one employer only, but is employed by him in a discontinuous manner—say, for example, a man who is employed to assist in working a ferry on market days or when the river is high, an employment which requires him to be ready to work when called upon, but does not employ him for a fixed period per week. If such a man were paid by the day his average weekly earnings would be the totality of his earnings during the relevant period divided by the number of weeks in that period. His normal week would not be a week in which he was employed through the whole of the six days, but would be a week in which he was employed for an average time. And this would be just and equitable, because the fact that the work was discontinuous, and that he was only being paid when he worked, would regulate the rate of wages. His wages during the days in which he was employed must cover and remunerate him for the enforced unemployment of the intervening period. Similarly the average weekly earnings of a charwoman would not be six times her daily charge; because it would be an incident of her employment to be employed only on so many days in the week as she could find jobs, and the effect of this discontinuity would generally be to make her average week include some idle time.

"The hesitation which I have felt in coming to the above conclusion arises mainly from the consideration of the provisions applicable to the special case to which I have referred in which the compensation is not based on the average weekly earnings. I refer to the case dealt with by the provisions of the earlier part of s. 1 (a) (i.), namely, where there has been a fatal accident in the case of a workman who has for the three years preceding the accident been in the employment of the same employers. In this case the compensation is based on the total of his earnings during these three years. We have not here to consider a case in which those earnings have been

interrupted during the three years by 'absence from work due to illness or any inevitable cause,' because according to s. 2 (c) that would prevent the earlier period counting, and would thus exclude the case from the special provisions in question, but undoubtedly those total earnings might be diminished by voluntary absence from work. The fact that this is so no doubt justifies caution in accepting any interpretation of the other provisions of the schedule which would prevent voluntary absence from work having this effect in other cases. But it must be remembered that in the special case to which I have referred, there is no question of average at all, nor is the Court directed or authorised to ascertain the rate per week at which the workman was being remunerated. None of the language which the Court has to interpret with regard to average weekly earnings applies to the case. The Legislature may well have considered that, in a case where there has been three years' uninterrupted employment by the same employer in the same grade of employment, the most satisfactory solution of the difficult question of *quantum* of compensation would be to take facts as they stand, and let the *quantum* be the reproduction of the actual earnings of that period. That, at all events, is what it has prescribed, and I do not think that we should be justified in allowing the fact that it has chosen this simple and practical solution in a case where no average has to be arrived at to influence us in the interpretation of the language used in the more difficult case where the compensation has to be arrived at by determining through an average the rate of remuneration at the date of the accident.

"There is one case of frequent occurrence which affords an example of the application of these principles. In works where a large number of men are employed it is usually the case that there are periods during the year when the works have to be stopped for holidays fixed and recognized by the trade. In such cases it is not optional to the workmen whether they shall work or not. The works are stopped, and perforce they must be idle. An example of this is presented by one of the cases now before us, where the Lancashire Wakes Week occurs during the relevant period.

"As I have already said, the fact that a workman does not work during any week, and is therefore not remunerated during that week, does not, in my opinion, affect the rate of his remuneration; but in the cases with which I am now dealing, the enforced idleness of these periods is an incident of the employment of such workmen, and the employers are entitled to urge that an allowance should be made in calculating the average weekly earnings in respect of the employment being to this extent discontinuous. A numerical example will serve to make my meaning plain. Let us assume that workmen are paid by time and are in the receipt of £2 a week at a mill which is closed for holidays for two weeks in the year. The wages earned by such workmen in the year are represented by fifty times £2, and not by fifty-two times £2, and the employer has a right to claim that this shall be recognized in calculating the average weekly earnings just as much as any other lack of continuity in employment which is inherent in the employment itself. But what is not, in my opinion, fair or in accordance with the Act, is to allow the calculation of the average weekly earnings of the particular workmen to be affected by

the question whether or not a larger or smaller amount of these enforced stoppages occur in the relevant period which furnishes the material for the average. For instance, two workmen in the same employment at the same wages would, in my opinion, be entitled to have their average weekly earnings estimated at the same figure even though the Wakes Week occurred in the period during which the one had been in the master's employment and did not so occur in the case of the other. The master would be entitled to have regard taken to the fact that the average weekly earnings in such employ were somewhat less than the £2 by reason of the fact that only fifty weeks were worked out of the fifty-two of which a year consists, but the rate of remuneration so arrived at must be applied equally to the case of each of the two workmen."

Notes.—The above portions of the judgments of the Master of the Rolls, and Fletcher-Moulton, L.J., deal with the general principles applicable to paragraph (2) of Schedule I. In part of the subsequent portions of the judgments in the case of *Bailey v. Kenworthy* [2658], it is impossible to reconcile the opinion of the Master of the Rolls as to the kind of interruption contemplated by the definition with the view of the Lord Justice on the subject. The method of calculation adopted by the Lord Justice was approved in *Carter v. Lang* [2659]. See the notes to that case and to *Anslow v. Cannock Chase Colliery Co., Ltd.* [2660].

2659.—*Carter v. Lang*, [1908] S. C. 1198; 45 Sc. L. R. 938; 1 B. W. C. C. 379—Ct. of Sess.

In ascertaining the amount of the average weekly earnings of a workman entitled to compensation under the Workmen's Compensation Act, 1906, the leading canon is stated in s. (2) (a) of the First Schedule, that "average weekly earnings shall be computed in such manner as is best calculated to give the rate per week at which the workman was being remunerated." In an ordinary case the average weekly earnings of a workman are to be ascertained by dividing the total amount earned during the relevant period of his employment by the number of weeks actually worked within that period, and, if there are regularly recurring trade holidays when no work can be done, by deducting from the result thus obtained a fraction equal to the fraction of the year during which for this reason no wages can be earned. In ascertaining the average weekly earnings, the question whether those days in any week on which the workman was absent from work are to be disregarded depends on the nature of the employment; and in an employment where it is customary to work for only a limited number of days in the week, the amount earned in these days may be taken as the weekly earnings of the workman. In the application of s. (2) (c) of the First Schedule, "absence from work due to illness or any other unavoidable cause" means absence from work due to a cause personal to the workman, as distinguished from the cause due to the work, such as trade holidays or an accidental stoppage of machinery. The question whether, in view of the shortness of the employment or of the other considerations indicated in s. (2) (a) of

the First Schedule, it is practicable to compute the rate of remuneration at the date of the accident from the facts of the workman's own employment, is a question of fact for the determination of the arbitrator, and is to be settled in each case by a consideration of the whole circumstances of the employment.

A workman who had been incapacitated by accident, and who was entitled to compensation, had been at the date of the accident for thirteen weeks in his employment. During that period he had earned for one week nothing and for another week very little on account of illness, and again for one week had earned nothing and for another week very little on account of trade holidays. The arbitrator calculated his average weekly earnings by dividing his total earnings by thirteen. In an appeal, the court, after enunciating the general rules above stated, recalled the determination of the arbitrator, and remitted to him to proceed.

Notes.—The principles laid down in *Perry v. Wright*, *Bailey v. Kenworthy*, etc. [2658] were discussed in this case by the Court of Session. The Lord President expressed his approval of the judgments of the Master of the Rolls and Lord Justice Moulton in *Perry v. Wright*, but pointed out that their judgments did not agree as to the kind of interruptions of work contemplated by the definition in the schedule. On this point the Lord President and Lord McLaren adopted the method of calculation employed by Lord Justice Moulton. In dealing with the headnote to *Bailey v. Kenworthy*, the Lord President expressed his opinion that the proposition contained therein, that “days in which no work is done and no wages are earned are to be disregarded,” was much too general. This opinion of the Lord President was approved by Cozens-Hardy, M.R., in *Anslow v. Cannock Chase Colliery Co.* [2660]. The following passage from the judgment of the Lord President in this case was adopted by Cozens-Hardy, M.R., in *Barnett v. Port of London Authority* (No. 1), [1913] 2 K. B., at p. 121 [2670]. “Supposing there is a trade in which there is an absolutely steady wage, as, for example, the case of an ordinary man employed in a shop at so many shillings weekly during the whole year, and supposing that the man had only been in the particular service two or three weeks, yet inasmuch as it was an engagement by the week, which would have lasted on to the end of the year, I think these two or three weeks or even one week, would be quite sufficient to show what was the average weekly wage. But, on the other hand, where you have classes of employment which vary very much in different times, in which the wages per week would be very different at one period of the year from those of another, and in which employment is very much more abundant at one period of the year than at another, then a very much larger number of weeks might be required in order to calculate a proper average. . . . Therefore, I do not think that the question of the shortness of time being practicable or impracticable to reckon an average can be settled by a mere question of figures. It must be settled in each case by a consideration of the whole circumstances of the employment. I think that is a matter which the sheriff has got to look into and determine.” *Grewar v. Caledonian Railway Co.* [2684] referred to.

2660.—*Anslow v. Cannock Chase Colliery Co., Ltd.*, [1909] A. C. 435 ; 78 L. J. K. B. 679 ; 100 L. T. 786 ; 25 T. L. R. 570 ; 53 S. J. 519—H. L.

A collier was injured in the course of his employment. For the twelve months preceding the date of his accident his total earnings amounted to £68. During the twelve months there were fourteen weeks of stoppage, when the applicant could not get work ; two weeks of Bank holidays and wakes, when he did not work ; two weeks when he was away owing to illness ; and one week when he took a holiday ; so that he only worked thirty-three weeks. The fourteen weeks of stoppage and two weeks of Bank holidays and wakes were normal and recognised incidents of the applicant's work. In calculating the applicant's average weekly earnings during the twelve months before the accident the county court judge first divided the total earnings—£68—by 33, and then took $\frac{2}{3}$ of the result in order to arrive at the true average for each week in the working year.

HELD—that this mode of calculating the average weekly earnings was right.

Decision of Court of Appeal ([1909] 1 K. B. 352 ; 78 L. J. K. B. 154 ; 99 L. T. 901 ; 25 T. L. R. 167 ; 35 S. J. 132) affirmed.

Notes.—In the Court of Appeal Cozens-Hardy, M.R., referred with approval to the decision in *Carter v. Lang*, [1908] S. C. 1198 [2659], and added: "I agree with the Lord President's comment on that part of the headnote in *Bailey v. Kenworthy*, [1908] 1 K. B. 441 [2658], which states that 'days in which no work is done and no wages are earned are to be disregarded.' That is an expression in too general terms." In the House of Lords, Lord Loreburn, L.C., said: "The object of the Act broadly stated is to compensate a workman for his loss of capacity to earn, which is to be measured by what he can earn in the employment in which he is, under the conditions prevailing therein, before and up to the time of the accident. If he takes a holiday and forfeits his wages for a month, then that does not interfere with what he can earn. It is only that for a month he did not choose to earn. So, too, if there be a casualty accidentally stopping the work. But if it is part of the employment to stop for a month in each year, then he cannot earn wages in that time in that employment, and his capacity to earn is less over the year. I agree with what the learned Master of the Rolls says in his judgment when he uses the following language: 'In my opinion the true test is this: what were his earnings in a normal week, regard being had to the known and recognised incidents of the employment? If work is discontinuous, that is an element which cannot be overlooked.'"

2661.—*White v. Wiseman*, [1912] 3 K. B. 352 ; 81 L. J. K. B. 1195 ; 107 L. T. 277 ; 28 T. L. R. 542 ; 56 S. J. 703 ; 5 B. W. C. C. 654 ; [1912] W. C. Rep. 403—C. A.

In arriving at the "average weekly earnings" of a workman for the purpose of arriving at the compensation payable to him under the Workmen's Compensation Act, 1906, regard is to be had to those

weeks during which the workman has not earned full wages owing to slackness of trade.

The average must be obtained by dividing the total wages earned by the number of working weeks in the year, after allowing for recognised holidays and interruptions by fortuitous accidents.

Notes.—*Perry v. Wright* [2658]; *Anslow v. Cannock Chase Colliery Co., Ltd.* [2660], followed.

2662.—*Turner v. Port of London Authority*, [1913] W. C. & I. Rep. 123; 29 T. L. R. 204; 6 B. W. C. C. 23—C. A.

A workman, who met with a fatal accident in the course of his employment, had been in his employment from the beginning of October, 1910, to the date of his death on May 20th, 1912, and his total earnings during that period amounted to £111 12s. 3d. On proceedings taken by the workman's widow to obtain compensation, the employers paid into court £202 9s. 6d., being a sum equal to 150 times the average weekly earnings of the workman, the weekly earnings being calculated on the division of £111 12s. 3d. by 86, the number of weeks worked. It appeared that during the eighteen months of his employment the workman was absent during eight days by illness, and that there were two broken weeks at the beginning and end of the employment. The county court judge adopted the employers' contention as to the calculation of the sum payable and awarded the amount paid into court.

HELD—that the award was right; that although the broken days at the beginning of the employment might strictly be added to the days in the broken week at the end, the county court judge was not bound in view of the length of the employment to go into this with microscopical accuracy; and that in the circumstances he was justified in disregarding the number of days during which the workman was absent through illness.

2663.—*James v. Mordey, Carner & Co., Ltd.* (1913), 6 B. W. C. C. 680; [1913] W. C. & I. Rep. 670—C. A.

A ship's painter after being employed three weeks injured his eye. The employers paid 14s. 4d. a week compensation for eleven weeks, and then stopped payment. The workman applied for compensation on the basis of total incapacity, stating his average weekly earnings to be 36s. a week. At the hearing there was evidence that ship's painters were paid 6s. a day, but could earn as much as 12s. when they worked overtime at night. The medical evidence as to the condition of the eye being unsatisfactory the matter was referred to a medical referee, who reported that in his opinion the man was exaggerating, but that if he was telling the truth he was unfit for the work of a ship's painter, but could do work not requiring the use of a ladder. Upon this report the judge found that the man was totally incapacitated by accident, and awarded £1 a week compensation on the basis that his average weekly earnings were 45s.

HELD—there was evidence to support the finding of total incapacity from the accident; but that there was no evidence that

the average weekly earnings were 45s. The case was, therefore, remitted for the assessment of compensation on a proper basis.

Notes.—Cozens-Hardy, M.R., considered that there was sufficient evidence of the difficulty in obtaining work, and said: "I think it is a case in which he is what has been colloquially known as an odd job man, and the case which applies is *Proctor v. Robinson*, [1911] 1 K. B. 1004 [2728], and not *Cardiff Corporation v. Hall*, [1911] 1 K. B. 1009 [2729]."

2664.—*Godden v. Cowlin*, [1913] 1 K. B. 590; 82 L. J. K. B. 509; [1913] W. C. & I. Rep. 330; 108 L. T. 166; 57 S. J. 282; 29 T. L. R. 255; 6 B. W. C. C. 154—C. A.

A carpenter who had been working in Canada came to England in November intending to return to Canada in April. He worked temporarily for employers whom he had informed of his intention to leave this country, and having met with an accident in February, after working for nine weeks, he claimed compensation. The arbitrator assessed compensation under Schedule I., clause (1) (b), of the Act at 50 per cent. of one-ninth part of the aggregate amount actually earned by the workman during the nine weeks. He refused to take into consideration that he might have earned more in the summer by working longer hours at the same employment, as he was intending to leave for Canada in April, and he considered it not "impracticable," under Schedule I., clause (2) (b), at the date of the accident to compute the rate of remuneration of the workman in this way.

HELD—that the employment being admittedly of a temporary character, the arbitrator had made no error of law in so computing the "average weekly earnings," and he was not bound to give the workman the benefit of the higher wages he might have earned when the days were longer if he had continued in the same employment.

Notes.—*Per* Cozens-Hardy, M.R.: "It was argued that the county court judge had no right to prophesy as to the future, or to do anything except to consider what was the applicant's position as a carpenter on February 29th. But he was not an ordinary carpenter. He was employed in circumstances which precluded him from taking up that position. The county court judge did not base his finding upon any estimate of future earnings. But he was entitled to say, 'Here is a man only temporarily in Great Britain, filling up the time between his arrival from Canada and his return passage to Canada.' Summer earnings were not in the contemplation of any one.

"I do not think that the view which I have now expressed is in any way inconsistent with what I said in *Perry v. Wright* [2658] with respect to seasonable occupations."

2665.—*Priestley v. Port of London Authority*, [1913] 2 K. B. 115; 82 L. J. K. B. 353; 108 L. T. 277; 29 T. L. R. 252; 57 S. J. 282; 6 B. W. C. C. 104; [1913] W. C. & I. Rep. 250—C. A.

A casual dock labourer employed during a long-continued strike of regular labour was thereby enabled to obtain more work, and to earn more than he would have done, had there been no strike.

HELD—that this circumstance must be taken into consideration in computing his average weekly earnings for the purpose of compensation.

Notes.—See *Barnett v. Port of London Authority* (No. 1) [2670]. The two cases were considered together by the Court of Appeal.

- **2666.**—*Brown v. Cunningham* (1904), 6 F. 997; 41 Sc. L. R. 835—Ct. of Sess.

A workman was engaged for a fixed weekly wage. He entered upon his work on a Saturday, and worked for the whole of the following calendar week, at the end of which his employment was terminated by his employers in consequence of an injury resulting in total incapacity, and entitling him to compensation under the Act.

HELD—that the fixed weekly wage was the basis for determining the amount of the weekly payment due to the workman as compensation under the Act.

Notes.—See now Schedule I. (1) (b) and Schedule I. (2) (a) of the present Act. *Lysons v. Andrew Knowles* [2579] applied. See also *Fleming v. Lochgelly Iron Co.* (1902), 39 Sc. L. R. 684, and *Campbell v. Fife Coal Co.* (1902), 40 Sc. L. R. 143.

III. "Grade."

N.B.—See the judgments in *Perry v. Wright* [2658].

- 2667.**—*Babcock and Wilcox, Ltd. v. Young*, [1911] S. C. 406; 48 Sc. L. R. 298; 4 B. W. C. C. 367—Ct. of Sess.

A workman who was by trade a boilermaker, and who had been employed for some time as a boilermaker and for some time as a labourer under the same employer, met with an accident while employed as a labourer. In an application by his employers to review and end compensation paid to him under a verbal agreement, the arbiter, in calculating his "average weekly earnings," took into account the amount which the workman had earned as a boilermaker, and awarded him compensation on the average wage thus ascertained.

HELD—that the compensation must be based on the wages the workman was earning in the grade of employment in which he met with the accident, and that the arbiter could not competently include his wages as boilermaker.

Notes.—*Per* the Lord Justice Clerk: "I think that this man was undoubtedly in the position stated by the Master of the Rolls in the case of *Perry v. Wright*, [1908] 1 K. B. 441. 'Any step up or step down from one grade to another is to be regarded as commencing a fresh employment.'"

- 2668.**—*Jury v. Owners of S.S. Atlanta*, [1912] 3 K. B. 366; 81 L. J. K. B. 1182; 107 L. T. 366; 28 T. L. R. 562; 56 S. J. 703; 5 B. W. C. C. 681; [1912] W. C. Rep. 389—C. A.

Before 1910 J. was employed as mate with the appellants, and while so employed he met with an accident which disabled him and

for which he received compensation. Between March 12th and October 15th, 1910, he was employed as a watchman at a wage of £1 a week. Between October 15th, 1910, and February 2nd, 1912, he worked as a "hobbler," i.e., in mooring and unmooring vessels in dock, at wages ranging from 12s. to 14s. a week. On February 3rd, 1912, his son, who was serving on board the *Atlanta* as mate, was injured, and J. was taken on as mate in his place temporarily and until such time as the son's injury should have healed. Six days later the *Atlanta* foundered and J. was drowned. In a claim for compensation by his dependants, the county court judge assessed the compensation upon the basis of the earnings of the deceased as a mate, treating the deceased as having the grade of a mate at the time of his death within the meaning of the term "grade" in paragraph (2) of Schedule I. to the Workmen's Compensation Act, 1906.

HELD—that the question of what grade the man occupied was not one merely of fact upon which the decision of the county court judge was final, but it was a question of law whether, upon the facts as found, the workman occupied a grade within Schedule I., paragraphs (1) and (2), of the Workmen's Compensation Act, 1906.

HELD ALSO—that the workman was at the time of his death temporarily acting as a mate, and that the county court judge must ascertain as best he could the "average weekly earnings" of the man taking into consideration the various rates of his wages.

Notes.—*Per* Farwell, L.J.: "The construction and the meaning of the word 'grade' in the Act is a question of law." *Per* Kennedy, L.J.: "'Grade,' I think, implies an element of permanence, not indeed in the service of the particular employer, for that may be, by custom or by contract, terminable, as for example a weekly or a monthly hiring, but in the character of the work by which the workman is normally and in practice earning his living." *Dobson v. British Oil and Cake Mills, Ltd.* [2671] applied. *Babcock and Wilcox, Ltd. v. Young* [2667] distinguished. *Perry v. Wright* [2658] referred to.

2669.—*Dalgleish v. Edinburgh Roperie and Sailcloth Co., Ltd.* (1913), 50 Sc. L. R. 916; [1913] W. C. & I. Rep. 676—Ct. of Sess.

A mill girl, aged fourteen, entered a mill in January, 1912, and was employed from that date until May 23rd in carrying bobbins from the roving machines to the spinning machines at a wage of 5s. 6d. a week. From then until June 1st she was employed at 6s. a week as signal girl, to intimate when bobbins were ready for removal. On June 1st, 1912, she was appointed to work a drawing machine, in which a coarse class of yarn was drawn out, her wages being increased to 6s. 6d. a week. On three occasions, the last of which was December 5th, 1912, she was moved to other drawing machines, where finer and still finer yarns were drawn, each time with an increase of 6d. in wages. After operating the last of the drawing machines at a wage of 8s. a week for a period of five weeks, she met with an accident which totally incapacitated her for work.

HELD—that the change in the girl's employment on December 5th, S.I.C.—VOL. II.

1912, was a change of grade in the sense of the Workmen's Compensation Act, 1906.

Notes.—*Per* Lord Johnston : “ Some employments have in them an element of the casual, and some of the seasonal as well as the casual in the ordinary sense, such as are illustrated in *Perry v. Wright*, and the other cases reported at [1908] 1 K. B. 441 [2658]. Other employments are of a regular nature, where the employee is almost as much part of the machinery of the establishment as the machine which he or she operates. In the former case, a change of work by no means involves a change of grade of employment; in the latter case, *primâ facie*, it much more readily does so. In the former case a rise or fall of wages, whether or not accompanied by a change of work, is no criterion of a change of grade of employment; in the latter a change of wages, accompanied by a change of work, goes very far to import such change of grade. There may be a change of department; there may be a change of the class of machine in the same department. A change of wages will not of itself import a change of grade, but if it accompanies a change of department, or a change of the class of machine, or even of the species within the same genus of machine, and is not temporary, but reasonably permanent, I think that there is in the sense of the schedule a change of grade.”

2670.—*Barnett v. Port of London Authority* (No. 1), [1913] 2 K. B. 115; 82 L. J. K. B. 353; [1913] W. C. & I. Rep. 250; 108 L. T. 277; 57 S. J. 282; 29 T. L. R. 252; 6 B. W. C. C. 104—C. A.

A man engaged as “ extra casual labourer ” met with an accident in his employment. He had only been engaged for a day when he met with the accident, so that his “ average weekly earnings ” had to be computed by taking the average amount earned by “ a person in the same grade ” as himself within Schedule I. (2) (a) of the Workmen's Compensation Act, 1906. The man's employers had two classes of casual labourers—“ B ” ticket men with preferential rights of employment and “ extra casual labourers.” “ B ” ticket men got on the average four days' work a week, and “ extra casual labourers ” three days' work a week. Both classes received the same rate of pay and did the same work.

HELD (Cozens-Hardy, M.R., *diss.*)—that the preference made a difference of grade between the “ B ” ticket men and the “ extra casual labourers,” and that in computing the man's average weekly earnings under Schedule I. (2) (a) regard must be had to the average amount earned by the latter grade, and not to that earned by the former grade.

A workman was taken on during a dock strike as an extra dock labourer and was incapacitated, after working for twelve days, by an accident arising out of and in the course of his employment. He was paid at the ordinary rate per hour of a casual dock labourer, but was able to earn more than an extra casual dock labourer would in ordinary times because there was a shortage of workmen and the employment was continuous. The arbitrator found that the circumstances were entirely abnormal, that there was no grade to which he could find that the workman belonged, and that the workman would

have earned during the strike period at least as much per week as he earned during the first week. He therefore computed the man's average weekly earnings at that amount and awarded compensation on that basis.

HELD—that the arbitrator had not misdirected himself, and was justified in computing the man's average weekly earnings in that way.

Notes.—Cozens-Hardy, M.R., in judgment said: "As was pointed out in *Perry v. Wright*, [1908] 1 K. B. 441 [2658], the dominant principle is to be found in the first sentence, namely, 'average weekly earnings shall be computed in such manner as is best calculated to give the rate per week at which the workman was being remunerated.' The fact that a man has worked only one complete week, and received X wages for that period, does not establish that his average weekly earnings were X. In some steady and constant employments that one week may be a sufficient test. But in many employments that would not suffice: X might be too much or too little." The Master of the Rolls adopted the language of the Lord President in *Carter v. Lang*, 45 Sc. L. R. 938 [2659], and continued: "Whenever the time is too short, or the casual nature of the employment is such as to make a strict mathematical computation 'impracticable'—of which the arbitrator is the judge—the arbitrator must do the best he can, and he 'may,' not must, have regard to the earnings of persons in the same grade.

"The word 'grade' has no technical meaning. In *Perry v. Wright* [2658] I endeavoured to express my view of its meaning. There are some industries in which grades are distinctly marked. A man steps from being a common seaman to being an A.B. or from being a bricklayer's labourer to being a bricklayer. A good workman is not in a distinct grade from an inferior workman doing the same work. Whether there is a distinct grade depends upon facts to be found by the arbitrator, although upon the facts found it may be a question of law whether they amount to or establish the existence of a distinct grade. Unless the arbitrator has misdirected himself upon a point of law, that court ought not to interfere with his finding. Microscopical accuracy is not required, and indeed it is seldom possible in computing average weekly earnings. The nature of the employment, its terms, its actual duration, and the personal qualifications of the workman may all be taken into consideration by the arbitrator." *Jury v. Owners of S.S. Atlanta* [2668] referred to.

2671.—*Dobson v. British Oil and Cake Mills, Ltd.* (1912), 106 L. T. 922; 5 B. W. C. C. 405; [1912] W. C. Rep. 207—C. A.

A workman was employed as a casual labourer for five weeks, when he met with an accident in the course of that employment. Occasionally during that time he had been employed to take the place of a grinder who was ill, for which he received higher remuneration, but he had not been employed as a grinder for fourteen days before the accident.

HELD—that, in considering the amount of compensation to be

awarded, the county court judge was justified in taking into account his earnings in both capacities.

Notes.—*Perry v. Wright* [2658] applied.

2672.—*Edge v. J. Gorton, Ltd.*, [1912] 3 K. B. 360; 81 L. J. K. B. 1185; 107 L. T. 340; 5 B. W. C. C. 614; 28 T. L. R. 566; 56 S. J. 719; [1912] W. C. Rep. 393—C. A.

A workman was employed by the respondents on May 19th, 1911, as a casual carter. For about a fortnight prior to his death on July 27th, which occurred by accident arising out of and in the course of his employment, he had been working as a teamster, driving two horses and receiving somewhat larger pay. In a claim for compensation by his dependants, the county court judge found as a fact that the deceased was employed temporarily and casually as a teamster while the respondents were on the look-out for a regular teamster. The county court judge held that, in these circumstances, the deceased's average weekly earnings were to be calculated by dividing the total amount of wages received by the deceased between May 19th and July 27th, whether earned as a casual carter or as a casual teamster, by the number of weeks worked.

HELD—that there had been no change of “grade” in the employment of the workman, and that the method of calculation adopted by the county court judge was right.

Notes.—*Dobson v. British Oil and Cake Mills, Ltd.* [2671] followed. It was pointed out in judgment that there was nothing in *Dobson's Case* inconsistent with either *Perry v. Wright* [2658] or *Babcock and Wilcox, Ltd. v. Young* [2667].

IV. *Employment by the same Employer.*

N.B.—See *Perry v. Wright* [2658].

2673.—*Hunter v. Baird* (1905), 7 F. 304; 42 Sc. L. R. 245—Ct. of Sess.

A miner employed by a contractor in a coal mine was dismissed from his employment on October 7th. On Friday, October 9th, he got employment from the coal-master in the same mine. On Monday, October 12th, he was injured in the course of his employment. In a claim for compensation under the Workmen's Compensation Act, against his employer:

HELD (Lord Young *diss.*)—that in estimating his average weekly earnings, his earnings under the contractor could not be taken into account.

See also *Buckley v. London and India Docks* [2576].

2674.—*Williams v. Poulson* (1899), 63 J. P. 757; 16 T. L. R. 42—C. A.

A workman, a dock labourer, sustained an accident after being in the service of his employer, a stevedore, for three and a half days. During the previous twelve months he had been employed by various

other stevedores as well as on a number of occasions by the stevedore in whose service he was at the time of the accident, who had engaged him in every week except four during that period, but sometimes only for one day. In assessing the amount of compensation payable to the workman, the county court judge added the various sums he had received as wages from such stevedore during the whole period of twelve months, divided the total amount by the number of weeks, and awarded half of such weekly amount as compensation. The workman appealed and claimed that he was entitled to compensation as if he had been in the master's employment for at least two weeks at the same rate of daily wages as he was earning when the accident happened.

HELD (dismissing the appeal)—that he was not so entitled.

Notes.—This case is inserted as it may still be of some value, but the point which was raised would not be taken under the present Act. See the proviso to Schedule I. (2) (a) and (b). *Price v. Marsden*, [1899] 1 Q. B. 493; *Small v. McCormick* [2680], applied on the ground that the workman must be in the employment of the same employer during the period in question. *Keast v. Barrow Hæmatite Co.*, 15 T. L. R. 141, referred to. A. L. Smith, L.J., said: "It was not necessary to decide the very important point whether the Act applied at all where the employment continued for less than two weeks."

2675.—Williams v. Wynnstay Collieries, Ltd. (1910), 3 B. W. C. C. 473—C. A.

In December, 1908, a collier was injured by accident. In December, 1909, he tried to resume his old work as a collier with the same employers, but being unable to do it was given work by them as a ventilation or windroad man—work paid by the day not piece-work. In January, 1910, he died from an accident within the meaning of the Act. A county court judge held that there had been a break in the continuity of his employment and he assessed the compensation for the defendants upon the basis of his earnings as a windroad man.

HELD—that the question was one of fact for the county court judge, and there being evidence to support it, the court would not interfere with his decision.

See also *Gill v. Fortescue* [2577].

N.B.—The following cases, decided under the Act of 1897, may still be of some value under the present Act. The points they decide have in effect been incorporated in paragraph (2) of Schedule I.

2676.—Jones v. Ocean Coal Co., [1899] 2 Q. B. 124; 68 L. J. Q. B. 731; 80 L. T. 582; 47 W. R. 484; 15 T. L. R. 339—C. A.

In assessing compensation to a workman under the Workmen's Compensation Act, 1897, the period, whether it be the twelve months prior to the injury or any less period, to be taken into consideration for the purpose of computing his average weekly earnings under s. (1) (b) of Schedule I. of the Act must be one period of substantially

continuous and consecutive employment by the master in whose employment the workman is at the date of the injury.

At a date twelve months prior to the injury to a workman he was in the employment of the employer by whom he was employed at the date of the injury, and so continued for some months, until in consequence of a strike the employment was duly terminated. The strike continued for some months, and at its termination the workman resumed employment with the same employer, but upon terms different from those of the previous employment, and so continued until the date of the injury.

HELD—that compensation under the Workmen's Compensation Act, 1897, must be assessed upon the basis of the workman's average weekly earnings, not during the previous twelve months, but during the period of employment subsequent to the strike only.

2677.—**Appleby v. Horseley Co.** (No. 1), [1899] 2 Q. B. 521 ; 68 L. J. Q. B. 892 ; 80 L. T. 853 ; 47 W. R. 614 ; 15 T. L. R. 410—C. A.

A workman, whose death resulted from personal injury caused by an accident in the course of his employment, was during the course of the three years preceding the injury employed by the same employer, in whose service he was at the time of the injury, for two separate continuous periods of employment, one period of employment being at the commencement of the three years, after which there was a break in the employment, and the second period immediately preceding the injury.

HELD—that compensation to the workman's dependants must, under clause (1) (a) (i) of the First Schedule of the Workmen's Compensation Act, 1897, be assessed upon the basis of his average weekly earnings during the continuous period of employment immediately preceding the injury only.

Note.—*Jones v. Ocean Coal Co.* [2676] referred to.

2678.—**Hathaway v. Argus Printing Co.**, [1901] 1 Q. B. 96 ; 70 L. J. Q. B. 12 ; 83 L. T. 465 ; 49 W. R. 113 ; 64 J. P. 804 ; 17 T. L. R. 42—C. A.

A workman engaged by employers on two nights in each week for a period exceeding two weeks, at a fixed rate of wages per night, was injured by an accident arising out of and in the course of his employment under this engagement. Besides the work done under this engagement he did casual employment for the employers and other firms.

HELD—that he was entitled to compensation under the Workmen's Compensation Act, 1897, on the basis of 50 per cent. of his weekly earnings under the engagement ; but was not entitled to anything in respect of the casual work.

HELD (by Collins, L.J.)—that mere discontinuous casual attendances and unconnected acts of employment with intervals, however

short, do not constitute employment within the meaning of Schedule I., clause (1), of the Act.

2679.—*Giles v. Belford*, [1903] 1 K. B. 843; 72 L. J. K. B. 569; 88 L. T. 754; 51 W. R. 692; 67 J. P. 399; 19 T. L. R. 422—C. A.

In an arbitration under the Workmen's Compensation Act, 1897, it appeared that the injured workman had worked continuously for the employers for a period of eighteen days previous to the accident, and that he had worked for them not continuously, but irregularly, for a period of twelve months previous to the accident. The county court judge found as a fact that the employment commenced at the beginning of the period of eighteen days, and he made an award of compensation on the basis of the applicant's average weekly earnings during that period.

HELD—that the county court judge had made his award on the right basis.

Notes.—*Jones v. Ocean Coal Co.* [2676] and *Williams v. Poulson* [2674] applied. *Lysons v. Knowles*, [1901] A. C. 79 [2579], distinguished.

2680.—*Small v. M'Cormick and Ewing* (1899), 1 F. 883; 36 Sc. L. R. 700—Ct. of Sess.

A workman who was killed by accident had been employed by the same employer for a varying number of hours on seventy-seven days, at irregular intervals, during a period of one hundred and five weeks, his employment being by the hour.

HELD—that in computing the "average weekly earnings" of the deceased, the total number of his earnings must be divided by 105, the number of weeks over which his employment extended.

Notes.—*Price v. Marsden*, [1899] 1 Q. B. 493, referred to. See *Williams v. Poulson* [2674].

2681.—*Hewlett v. Hepburn* (1899), 16 T. L. R. 56; 2 W. C. C. 123—C. A.

The respondent was in the employment of the appellants from August 24th, 1897, until February 17th, 1898. He was absent through illness from February 17th until May 12th, 1898, then he worked until August 18th, when he was again absent through illness until September 3rd, 1898. He then came back and remained at work until February 6th, 1899, when he met with an accident. No notice to terminate the employment was given, and the respondent, when he went back to work after each illness, did not go in to re-engage himself. He left his tools when absent at the appellants' works. He did not receive wages when absent. The county court judge held that the employment was not continuous, as the absences were breaks in the employment, and that the basis for calculating

compensation was the period from September 3rd, 1898, until the accident.

HELD—there was evidence to support the findings.

N.B.—The following cases under the Act of 1897 were decided on principles similar to the above, and are now of little value :—

2682.—*Gibb v. James Dunlop & Co. (1900), Ltd.* (1902), 4 F. 971 ; 39 Sc. L. R. 750—Ct. of Sess.

2683.—*Powell v. Ryan* (1903), 37 Ir. L. T. R. 9—C. A. (Ir.)

2684.—*Grewar v. Caledonian Railway Co.* (1902), 4 F. 895 ; 39 Sc. L. R. 687—Ct. of Sess.

2685.—*Ayres v. Buckeridge, Wheale v. Rhymney Iron Co., Ltd., Jones v. Rhymney Iron Co., Ltd.*, [1902] 1 K. B. 57 ; 71 L. J. K. B. 28 ; 85 L. T. 472 ; 18 T. L. R. 20 ; 65 J. P. 804 ; 4 W. C. C. 120—C. A.

See also *Keast v. Barrow Hæmatite Steel Co.*, 15 T. L. R. 141 ; *Russell v. M'Clusky*, 2 F. 1312 [2580].

FIXING THE AMOUNT OF THE WEEKLY PAYMENT.

Schedule I., paragraph (3). In fixing the amount of the weekly payment, regard shall be had to any payment, allowance, or benefit which the workman may receive from the employer during the period of his incapacity, and in the case of partial incapacity the weekly payment shall in no case exceed the difference between the amount of the average weekly earnings of the workman before the accident and the average weekly amount which he is earning or is able to earn in some suitable employment or business after the accident, but shall bear such relation to the amount of that difference as under the circumstances of the case may appear proper.

Firstly, "regard must be had to any payment, allowance, or benefit."

Payments made by an employer to a hospital to provide for the maintenance of an injured workman are a "benefit" within the schedule and may be regarded by the arbitrator (*Sorensen v. Gaft* [2686]; *Kempson v. S.S. Moss Rose (Owners)* [2687]), and so may a sum paid by an employer by way of settlement of a claim (*Horsman v. Glasgow Navigation Co., Ltd.* [2688]). But regard must not be had to expenses of maintenance of an injured seaman which the shipowner is compelled to pay under the Merchant Shipping Act (*McDermott v. Owners of SS. Tintoretto* [2407]), nor to poor law relief (*Gilroy v. Mackie* [2500]), nor to weekly payments out of a fund to which workman and employer have contributed (*Bullen v. London United Tramways* [2689]; see also *Doyle v. Cork Steam Packet Co.* [2690]).

Secondly, "difference between the weekly earnings before and after the accident."

The workman who is partially incapacitated may be awarded the whole amount of the difference between his earnings before and after the accident so long as the maximum fixed by paragraph (1) (b) of Schedule I. is not exceeded (*Illingworth v. Walmsley* [2691]; *Geary v. Dixon* [2692]). But he may not be awarded a greater sum than the difference between the wages which he earned before the accident and his wages since the accident (*Brookfield Linen Co. v. Clugston* [2696]; see also *Bryson v. Dunn* [2697]). Proof that the workman is able to earn something raises a *prima facie* case for reduction, but it is open to the workman to prove circumstances showing that no reduction should be made (*Pryde v. Moore* [2698]). The arbitrator may, subject to the limit mentioned, exercise his discretion as to the amount to be awarded (*Humphreys v. City of London Electric Lighting Co.* [2699]), but he may not lay down any general rule as to the amount to be awarded, but must decide each case on its merits (*Webster v. Sharp* [2700]).

Under the Act of 1897 it was held that fluctuations in the genera

rate of wages occurring since the accident could not be taken into account by the arbitrator (*James v. Ocean Coal Co.* [2703]; *Jamieson v. Fife Coal Co.* [2704]). But under the present Act the courts have held that in fixing the amount of the weekly payment regard must be had to the circumstance that there has been a reduction in the general rate of wages owing to legislation since the accident (*Bevan v. Energlyn Colliery Co.* [2705]; see also *Malcolm v. Thomas Spowart & Co.* [2706] and *Black v. Merry and Cunningham* [2707]). If an arbitrator awards compensation to a workman on the basis of his actual wages before the accident, exclusive of sums earned by way of commission, he will be estopped, upon an application to review, from calculating compensation on a different basis so as to include the commission (*Hains v. Strange and Corbett* [2708]).

Thirdly, "able to earn in some suitable employment or business."

In having regard to the amount which the workman is able to earn after the accident in some suitable employment or business, the arbitrator cannot exclude from consideration the average amount which the workman is able to earn in a business carried on by himself (*Norman and Burt v. Walder* [2709]). The profits made in the business are not the measure of the workman's earning capacity, but the arbitrator must inquire what services the man actually performed in the business, and what he would have had to pay somebody else for doing those services (*Paterson v. Moore* [2710]; *Duberley v. Mace* [2711], and *per Fletcher Moulton, L.J., in Calico Printers v. Higham* [2821]).

The fact that the man is earning something, or is physically capable of earning something, is not sufficient to deprive him of compensation, for the arbitrator is entitled to find that the workman's opportunity of obtaining employment has been narrowed in consequence of the accident (*Clark v. Gas Light and Coke Co.* [2712]; *Beddard v. Stanton Ironworks Co.* [2713]; *Thomas v. Fairbairne, Lawson & Co.* [2714]). Also the arbitrator may take into account the fact that a skilled workman is only able to get casual employment as a result of an injury (*Brown v. Thornycroft* [2715]), but in the case of an unskilled labourer incapacity is not confined to incapacity to do former work (*Cammell, Laird & Co. v. Platt* [2716]). The question is not whether the employers are paying the workman the same wages as he received before the injury, but whether the man's earning power would be diminished if he had to compete in the open labour market (*Birmingham Cabinet Manufacturing Co. v. Dudley* [2717]; *Warwick SS. Co. v. Callaghan* [2718]; *Wilson v. Jackson's Stores* [2719]; *Freeland v. Macfarlane* [2702]). It is for the employer to prove that the incapacity has ceased, and he does not discharge the *onus* cast upon him by merely proving that the workman is doing light work at the old rate of wages (*Cory v. Hughes* [2720]). See also *New Monckton Collieries v. Toone* [2721]).

The question of the suitability of employment is purely one of fact for the arbitrator having regard not merely to the physical condition of the man but also to the nature and character of his occupation before the accident and the nature of the work which is offered after the accident (*Eyre v. Houghton Main Colliery Co.* [2722]; *Dinnington Main Coal Co. v. Bruins* [2723]; *Elliott v. Curry and Dodd* [2724]; *Wallis v. McNeice* [2725]; *Ellis v. Knott* [2726]). See

also *Clarke, Nicholls and Coombs v. Knox* [2727], where it was held that if there is a refusal of an offer of suitable employment at higher wages than those earned before the accident the payment of compensation ought to be stopped and a declaration of liability granted).

Fourthly, ability to do light work.

If the employers can show that the man is able to do light work and is no longer completely incapacitated there will be a change of circumstances entitling them to a reduction of compensation. But the employers must show what kind of particular light work the workman could do and give some evidence of his chance of obtaining such work (*Proctor v. Robinson* [2728]), unless they can show that the workman is capable of doing any kind of light work (*Cardiff Corporation v. Hall* [2729]; *Guest, Keen and Nettlefolds v. Winsper* [2730]). It would appear that in the case of an unskilled labourer, who is proved to be capable of light work, the *onus* is upon him of showing that he is unfit for the work offered to him (*Gray, Dawes & Co. v. Reed* [2732]). It is not necessary to prove the amount which can be earned in light work (*Carlin v. Stephen* [2733]), and it would appear that the arbitrator may act upon his own local knowledge of the labour market (*Roberts and Ruthven v. Hall* [2735]). Other cases are also included on this point.

The cases are divided as follows :

- I. "Payment, Allowance or Benefit."
- II. "Difference between the Weekly Earnings Before and After the Accident."
 - (1) What Part of Difference may be Awarded.
 - (2) Earnings Before and After the Accident.
- III. "Able to Earn in some Suitable Employment or Business."
 - (1) Earning Capacity in Workman's own Business.
 - (2) Opportunity of Obtaining Employment narrowed by Injury.
 - (3) Suitable Employment.
- IV. Ability to do Light Work.

I. "*Payment, Allowance or Benefit.*"

2686.—*Sorensen v. Gaft & Co.*, [1912] S. C. 1163; 49 Sc. L. R. 896; [1912] W. C. Rep. 342—Ct. of Sess.

A seaman, injured by accident arising out of and in the course of his employment, received maintenance and medical treatment in a hospital, which was subsequently paid for by the employer on an account rendered by the hospital. In an arbitration under the Workmen's Compensation Act, 1906, the arbiter found that the payment in question was a benefit received by the seaman during the period of his incapacity within the meaning of Schedule I., paragraph (3), of the Act.

HELD—that there was evidence before the arbiter on which he could reasonably come to this finding, and that it could not be set aside.

2687.—*Kempson v. S.S. Moss Rose (Owners)* (1910), 4 B. W. C. C. 101.—C. A.

A seaman who had been injured was carried to a hospital whilst unconscious and remained there for fifteen weeks. The shipowners made payments for his maintenance during that period equal to the full weekly rate of compensation. They were not legally compellable to make these payments under the Merchant Shipping Act, 1894.

HELD—that such payments were a "benefit" within Schedule I., paragraph (3), and that regard must be had to them in fixing the weekly amount of compensation.

Note.—*McDermott v. Owners of SS. Tintoretto*, [1909] 2 K. B. 704 [2407], referred to. In that case the owners were compelled to make payments under the Merchant Shipping Act. See also *Gilroy v. Mackie*, 46 Sc. L. R. 325 [2500].

2688.—*Horsman v. Glasgow Navigation Co., Ltd.* (1909), 3 B. W. C. C. 27—C. A.

The employers, after paying compensation for some months, gave the applicant £10 in full settlement. The county court judge refused to register a memorandum of this agreement, and on a subsequent application for compensation refused to take into account the £10 paid by the employers.

HELD—that the judge should have taken into account the amount so paid.

2689.—*Bullen v. London United Tramways, Ltd.* (1906), 121 L. T. J. 415; 8 W. C. C. 103—County Court.

The fact that a workman has received payment in respect of his injury from a mutual aid fund to which his employers contributed

before the accident is not an element for consideration in assessing the amount of compensation.

A workman's compulsory contributions to such a fund, which are deducted from his wages, do not diminish the amount of his weekly earnings.

2690.—*Doyle v. Cork Steam Packet Co.* (1912), 5 B. W. C. C. 350; [1912] W. C. Rep. 203—C. A.

On an application to review, the judge found that a workman should have received part compensation from August to December. Full weekly payments had actually been made from August to October, but nothing since. The judge, in assessing compensation, found that the total of the payments which the workman had received from August to October was greater than the total of the payments which he ought to have received up to December, and, setting off the one against the other, refused to order any further payment.

HELD—that there must be a rehearing.

II. “*Difference between the Weekly Earnings Before and After the Accident.*”

(1) *What Part of Difference may be Awarded.*

2691.—*Illingworth v. Walmsley*, [1900] 2 Q. B. 142; 69 L. J. Q. B. 519; 82 L. T. 647; 16 T. L. R. 281—C. A.

Clause (2) of Schedule I. of the Workmen's Compensation Act, 1897, which provides that in fixing the weekly payment (which is to be the compensation under the Act in the case of the workman's incapacity for work) regard shall be had to the difference between the amount of the average weekly earnings of the workman before the accident, and the average amount which he is able to earn after the accident, does not cut down the limit imposed by clause (1) (b), which provides that the weekly payment is not to exceed 50 per cent. of the workman's average weekly earnings.

2692.—*Geary v. Dixon* (1902), 4 F. 1143—Ct. of Sess.

2693.—*Parker v. Dixon* (1902), 4 F. 1147—Ct. of Sess.

2694.—*Corbet v. Glasgow Iron and Steel Co.* (1903), 5 F. 782—Ct. of Sess.

In fixing the amount of compensation in cases of partial incapacity the arbitrator may, if on the evidence he sees fit, give as compensation the whole amount of the difference between the average earnings of the workman before the injury and the average amount of his earnings after the injury, provided that it does not exceed 50 per cent. of the average earnings before the injury, and does not exceed £1 a week.

2695.—*Jones v. London and North Western Railway* (1901), 4 W. C. C. 140.

The amount of compensation recoverable is not limited to half the difference between the earnings before and after the accident.

Notes. *Pomphrey v. Southwark Press*, [1901] 1 Q. B. 86 [2648], discussed.

2696.—*Brookfield Linen Co. v. Clugston* (1909), 44 Ir. L. T. 10—C. A. (Ir.)

Where a workman who is partially incapacitated as the result of an accident afterwards accepts from his employers different employment from that in which he was injured, and it is proved that he can earn certain wages in such employment, the court cannot award him as compensation a greater sum than the difference between the wages which he earned before the accident and the wages offered to him since the accident.

2697.—*Bryson v. Dunn and Stephen* (1905), 8 F. 226; 43 Sc. L. R. 236—Ct. of Sess.

A workman who had been totally incapacitated by an accident, and whose average weekly earnings were 36s. 8d., was awarded under the Act a weekly payment of 18s. 4d., being 50 per cent. of his previous wages. His incapacity having partially ceased, he was taken back into his employers' service at a wage of 17s. per week, and his employers, in view of that change of circumstance, applied to the arbitrator to review the weekly payment of 18s. 4d. The arbitrator, in these circumstances, declined to diminish the existing payment. On appeal, the court held that the arbitrator's award was not disconform to the statute.

Semle (per Lord McLaren), an arbitrator may not award such a sum as would, when added to the wages being earned, give the workman a larger weekly income than he was earning before the accident.

Notes.—*Parker v. Dixon* [2693]; *Geary v. Dixon* [2692], applied.

2698.—*Pryde v. Moore & Co.*, [1913] S. C. 457; 50 Sc. L. R. 302; 6 B. W. C. C. 384; [1913] W. C. & I. Rep. 100—Ct. of Sess.

When a workman who has been totally incapacitated, and has been receiving full compensation in terms of the Workmen's Compensation Act, 1906, partially recovers and is earning a wage, a *prima facie* case arises for reducing his compensation; but it is open to him to prove circumstances which will warrant the arbitrator, in the exercise of his discretion, in refusing to diminish the compensation. The circumstance that the compensation he has been receiving together with the wage he is earning does not equal his average weekly earnings before the accident does not by itself justify a refusal to diminish.

Notes.—Per Lord Guthrie: "The cases of *Geary v. Dixon*

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[2692], *Parker v. Dixon* [2693], and *Bryson v. Dunn and Stephen* [2697], arose under the previous Act of 1897, and the case of *Carlin v. Stephen*, [1911] S. C. 901 [2733], was decided under the existing Act of 1906. The result of these cases is that circumstances like the present raise a *prima facie* case for reduction, but that it is open to the workman to prove circumstances which will warrant the arbitrator (he being the judge of their sufficiency) to refuse to diminish the compensation." This case also decided a question on the genuineness of a memorandum (see [2914]).

2699.—Humphreys v. City of London Electric Lighting Co. (1911),
4 B. W. C. C. 275—C. A.

The arbitrator is not compelled to give the full difference between the earnings before and after the accident, and so long as he exercises his discretion without misdirecting himself, his finding cannot be interfered with.

2700.—Webster v. Sharp & Co., [1905] A. C. 284 ; 74 L. J. K. B. 776 ; 92 L. T. 373—H. L. (E.)

In awarding compensation under the Workmen's Compensation Act, 1897, for the partial incapacity of a workman, the arbitrator cannot lay down any general rule as to the amount to be awarded, but must decide each case on its merits. Decision of the Court of Appeal, [1904] 1 K. B. 218, affirmed by consent upon terms.

2701.—Irons v. Davis and Timmins, Ltd., [1899] 2 Q. B. 330 ; 68 L. J. Q. B. 673 ; 80 L. T. 673 ; 47 W. R. 616—C. A.

A workman, who was so injured as to necessitate the amputation of a thumb, on return to work for the same employers was engaged on a different class of work, but was paid the same amount of wages a week as he received before the accident.

HELD—that there was no evidence of partial incapacity for work to justify an award for any weekly payment under clauses 1 (*b*) and 2 of the First Schedule to the Workmen's Compensation Act, 1897 ; but that 1*d.* a week was the proper award.

2702.—Freeland v. Macfarlane (1900), 2 F. 332—Ct. of Sess.

The test of a workman's right to compensation under the Act of 1897 is the diminution of his earning capacity in the future by reason of the injury received, and the mere fact that at the date of his claim he is earning the same wages as he did before the accident does not necessarily exclude the claim under the Act.

Notes.—*Irons v. Davis and Timmins* [2701] ; *Chandler v. Smith*, [1899] 2 Q. B. 506 [2139], approved. See also *Birmingham Cabinet Manufacturing Co. v. Dudley* [2717].

(2) *Earnings Before and After the Accident.*

2703.—*James v. Ocean Coal Co.*, [1904] 2 K. B. 213 ; 73 L. J. K. B. 915 ; 90 L. T. 834 ; 52 W. R. 497 ; 68 J. P. 431 ; 20 T. L. R. 483—C. A.

A workman employed as a haulier in a colliery was totally incapacitated for work by reason of personal injury caused by an accident arising out of and in the course of his employment. His average weekly earnings as a haulier before the accident were 34s., and his employers after the accident continued to make him, as compensation under the Workmen's Compensation Act, 1897, weekly payments of 17s. a week, being the maximum compensation under the Act. The workman, having after a time partially recovered from his injury, was taken back by his employers into their employment at light work as a lampman at weekly wages of 29s. 5d. a week. At that time the wages of hauliers had fallen to 29s. 5d. a week. The employers having refused to pay the workman any sum as compensation in addition to his wages of 29s. 5d. a week, the workman filed a request for arbitration in the county court. The county court judge was of opinion that, in determining the amount of compensation, if any, which should be awarded to the workman, the proper principle to be adopted was that the basis—that is, the average weekly earnings on which the amount of compensation was originally fixed—should be varied to the extent of the variation at the time in the wages earned by persons in similar employment to that in which the workman was engaged prior to the accident, and he refused to award the workman any compensation, in addition to the weekly wages he was earning at the time.

HELD (on appeal)—that the principle adopted by the county court judge was wrong, and that the case must be remitted to him for reconsideration, having regard to all the circumstances of the case.

Notes.—*Per Collins, M.R.* : “ I think that the maximum fixed in the first instance is entirely independent of subsequent fluctuations of wages. That seems to me to be the effect of the decision in *Jamieson v. Fife Coal Co.* [2704] and the scheme of the Act.” But see *Bevan v. Energlyn Colliery Co.* [2705].

2704.—*Jamieson v. Fife Coal Co.* (1903), 5 F. 958 ; 40 Sc. L. R. 704—Ct. of Sess.

In fixing the amount of compensation to be paid to a miner who had been totally incapacitated for work by an accident, the arbitrator, in view of the fact, first, that the workman had reached an age (sixty-four) when full wages as a miner could not be earned, and secondly, that there had been a general fall in the rate of miners' wages subsequent to the accident, awarded a sum less than half the workman's wages before the accident.

HELD—that it was incompetent for the arbitrator to take these considerations into account in fixing compensation.

2705.—*Bevan v. Energlyn Colliery Co.*, [1912] 1 K. B. 63; 81 L. J. K. B. 172; 105 L. T. 654; 28 T. L. R. 27; 5 B. W. C. C. 169; [1912] W. C. Rep. 126—C. A.

The applicant, a collier, was injured in the course of his employment in 1907. He received a weekly payment of £1 during total incapacity. In August, 1911, he commenced proceedings to have compensation awarded in respect of his partial incapacity. At the time of the accident the applicant was earning £2 19s. 1d. per week; in August, 1911, he was earning £1 12s. 7d. per week. Since the time of the accident colliers' earnings had fallen considerably owing to the passing of the Coal Mines Regulation Act, 1908.

HELD—that in fixing the amount of the weekly payment payable to the applicant regard must be had to the circumstance that a great reduction in colliers' wages had been effected by reason of the passing of the Coal Mines Regulation Act, 1908.

Notes.—*James v. Ocean Coal Co.* [2703] distinguished. Cozens-Hardy, M.R., pointed out that the words at the end of clause (3), "but shall bear such relation to the amount of that difference as under the circumstances of the case may appear proper," are introduced for the first time in the Act of 1906. The Master of the Rolls said: "I find in those words at the end of clause (3) what amounts to a positive direction that the learned county court judge ought to consider not only the amount of the man's earnings, in which I include ability to earn at the date of the accident, and the amount of earnings or ability to earn at the present time, but is to have regard to this direction: 'shall bear such relation to the amount of that difference as under the circumstances of the case may appear proper.' If wages are going up, that is a provision which may tend very much to the benefit of the workman, if wages are going down it may be for the benefit of the employer; but, whichever way it happens, I think it is not competent to the learned county court judge to say 'I have nothing to do with that. All I have to do is to take two personal elements, the elements personal to the individual workman, and I do not go outside that.'"

Fletcher Moulton, L.J., in dealing with the question of partial incapacity said: "It must never be forgotten that the duty of the learned county court judge on such an application as this is to assess compensation in the shape of a weekly payment. But he is not allowed a free hand. The Legislature has taken great care to prevent exorbitant compensation being given to the workman. If you look at sub-s. (b) of the first section of the First Schedule to the Act, you find it says: 'Where total or partial incapacity for work results from the injury, a weekly payment during the incapacity not exceeding 50 per cent. of his average weekly earnings during the previous twelve months, if he has been so long employed, but if not then for any less period during which he has been in the employment of the same employer.' So that the first maximum which is binding on the tribunal assessing compensation is half the wages that he was earning at the time. But there is a second provision for the purpose of preventing too heavy awards of compensation. It is to be found in the very same sub-section: 'Such weekly payment not to exceed

one pound.' Then when you come to clause 3 it says that in fixing the amount of the weekly payment in the case of partial incapacity, 'the weekly payment shall in no case exceed the difference between the amount of the average weekly earnings of the workman before the accident, and the average weekly amount which he is earning or is able to earn in some suitable employment or business after the accident.' So that there are three maximums; the amount must not exceed any one of those three, and therefore, of course, the learned county court judge in assessing it is bound not to exceed the lowest of them."

See the "Scale of Compensation," under Schedule I., paragraph (1).

2706.—Malcolm v. Thomas Spowart & Co., Ltd. (1913), 50 Sc. L. R. 823; [1913] W. C. & I. Rep. 523—Ct. of Sess.

The compensation paid to a minor workman was by agreement raised to 12s. 6d. a week on the assumption that if he had remained uninjured he would probably have been earning 25s. a week. In an application at his instance to have the sum increased to 17s. 6d. on the assumption that but for the accident he would have been able to earn 35s. a week :

HELD—that the arbitrator was not bound to grant an increase on account, *per se*, of a general rise in the rate of wages, but that he was entitled to take into account the rise in the rate of wages as an element in considering what the workman would probably have earned had he remained uninjured.

2707.—Black v. Merry and Cuninghame, Ltd., [1909] S. C. 1150; 46 Sc. L. R. 812—Ct. of Sess.

A workman, who in the course of his employment met with an accident necessitating the amputation of his right hand, subsequently accepted employment in a different capacity, receiving the same wages as he had earned before the accident. Some time after his wages were reduced owing to a general fall in wages, and he proceeded to claim compensation.

HELD—that as the change in his wages was not attributable to any change in the workman's capacity to earn wages he was not entitled to compensation.

Notes.—*Per* Lord Low : " If instead of falling, the rate of wages had risen, as it might have done, and may still do, it is plain that the respondent would have reaped the benefit, and, in like manner, the rate of wages having fallen, I think the loss must fall upon him. Of course, if the fall in wages had been due to supervening incapacity, that would have been a totally different matter."

2708.—Hains and Strange v. Corbett (1912), 5 B. W. C. C. 372; [1912] W. C. Rep. 288—C. A.

A workman injured his left eye. He earned £1 10s. a week before the accident plus £1 in commission and tips. After the

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accident he could only earn £1. He claimed £1 as compensation. The county court judge disregarded the commission and tips and awarded 10s. a week compensation, being the difference between £1 10s. earned before the accident and £1 earned afterwards. Soon after this the man was able to earn at similar employment £2 a week, whereupon the employers applied to review and terminate the payments. The county court judge, however, awarded 5s. a week compensation.

HELD—that as the man was earning more than his average weekly earnings before the accident, as found in the original application, it was not competent to award any compensation.

Notes.—See [2656], [2657].

III. “*Able to Earn in some Suitable Employment or Business.*”

(1) *Earning Capacity in Workman's own Business.*

2709.—**Norman and Burt v. Walder**, [1904] 2 K. B. 27 ; 73 L. J. K. B. 461 ; 90 L. T. 531 ; 52 W. R. 402 ; 68 J. P. 401 ; 20 T. L. R. 427—C. A.

Upon an application by the employer under Schedule I., clause (12) of the Workmen's Compensation Act, 1897, to review the weekly payments directed to be made to a workman by an award under the Act upon the ground that the earnings of the workman are then such that the weekly payments should be ended or diminished, the arbitrator cannot exclude from consideration the average amount which the workman is able to earn in a business carried on by himself.

Notes.—See the comments on this case by Fletcher Moulton, L.J., in *Calico Printers Association, Ltd. v. Higham*, [1912] 1 K. B. 93 [2821].

2710.—**Paterson v. Moore**, [1910] S. C. 29 ; 47 Sc. L. R. 30 ; 3 B. W. C. C. 541—Ct. of Sess.

Colliery owners who had been paying compensation to a miner injured in their employment applied to the sheriff as arbitrator to end or diminish these payments on the ground that the workman's incapacity had ceased or greatly lessened. The sheriff found that the workman had not sufficiently recovered to resume his occupation as a miner, but that he had for a year been carrying on a public-house business ; that, after deducting interest on capital, wages, and other expenses, the net profits of that business amounted to £98 per annum, which sum he treated as the measure of the workman's earning capacity ; and that as this sum exceeded the workman's average earnings prior to the accident (£94 per annum), his incapacity for work had terminated ; and accordingly he ended the payments.

HELD—that the profits made in the business were not the measure of the workman's earning capacity ; and that the sheriff must inquire what services the man actually performed in the business, and what these services would have been worth if, instead of serving himself, he had been serving another.

2711.—*Duberley v. Mace* (1913), 6 B. W. C. C. 82; [1913] W. C. & I. Rep. 199—C. A.

A farm teamster was receiving 5s. a week compensation for the loss of a thumb under a recorded memorandum of an agreement to pay the 5s. so long as he was not earning more than 10s. a week, in which event the amount was to be settled by arbitration. He subsequently left his employment and took a farm of his own of fifty-four acres at a rent of £95 per annum. He had, *inter alia*, eight bullocks and two horses, and employed his father at 13s. a week and board and lodging, and also a lad. On an application by his old employers to diminish the payments, the county court judge found he was earning more than 10s. a week, and reduced the compensation to 1d. a week.

HELD—that there was evidence to support the finding.

Notes.—*Per Cozens Hardy, M.R.*: “When a man is a master, it is very difficult to say what he is capable of earning. It is not necessary for the employer to show that the man has actually been making a profit. All one can say is that, considering the man is doing what he did, what would he have had to pay somebody else for doing that.” *Norman and Burt v. Walder* [2709]; *Roberts and Ruthven, Ltd. v. Hall* [2735], referred to.

(2) *Opportunity of obtaining Employment narrowed by Injury.*

2712.—*Clark v. Gas Light and Coke Co.* (1905), 21 T. L. R. 184—C. A.

A gasworks coal porter in the employment of a gas company was, in December, 1899, injured by an accident which resulted in the loss of four fingers of his left hand. His weekly wages were 41s. 9d. and the company agreed to pay him £1 a week compensation under the Workmen's Compensation Act, 1897. In January, 1901, the company offered him employment as a gateman and timekeeper at weekly wages of 27s., which he refused. In April, 1901, at the instance of the company, the county court judge made an award reducing the weekly amount of compensation to 14s. 9d. Subsequently the workman accepted the employment which he had previously refused, but in consequence of his refusing to note down the times of arrival of the workmen, he was dismissed. The workman thereupon made an application to the county court judge to increase the weekly payment of 14s. 9d., which was refused. More than a year later a further application was made to increase the weekly payment, when the judge found that the workman had not since the accident been capable of earning wages as a gasworks porter, that he was capable of earning wages as a gatekeeper, timekeeper, watchman, or in any similar work, and that he had made reasonable efforts, but had been unable to get such employment. The judge accordingly held that the workman was entitled to have the £1 weekly compensation restored.

HELD—that the county court judge was entitled to find that the workman's opportunity of finding employment had been narrowed in consequence of the accident, and that the weekly payment of £1 should be restored.

Notes.—The decision in this case was approved by Lord Shaw in *Ball v. Hunt*, [1912] A. C. 496 [2594].

2713.—Beddard v. Stanton Ironworks Co., [1913] W. C. & I. Rep. 535 ; 6 B. W. C. C. 627—C. A.

A workman in the course of his employment had his foot badly crushed, whereby he was permanently incapacitated from doing his old work. He was capable of doing light work which did not necessitate standing, but he was only able to walk a very short distance, and his old employers' works were situated two miles away from where he lived. The county court judge found that the workman was so situated that there was no reasonable chance of his obtaining any other work, and that he was therefore totally incapacitated for work within the meaning of the Workmen's Compensation Act, 1906.

HELD—that the evidence justified the finding of the county court judge.

2714.—Thomas v. Fairbairne, Lawson & Co., Ltd. (1911), 4 B. W. C. C. 195—C. A.

A workman with an injury to his knee recovered sufficiently to be able to resume work, but his knee was liable to break down at any time. He was unable to obtain any work from his employers or any one else, owing to his having had an accident, and to the chance of his breaking down.

HELD—that he was entitled to full compensation.

2715.—Brown v. Thornycroft & Co., Ltd. (1912), 5 B. W. C. C. 386 ; [1912] W. C. Rep. 314—C. A.

A boilermaker lost an eye by accident, and on recovery applied for arbitration. The judge found that he was capable of doing his old work and awarded 1*d.* a week. The man returned to the same employers at the same rate of wages, but was subsequently discharged for alleged misconduct. He failed to get similar employment elsewhere, and then applied for a review. The judge increased the payments and found that there had been no misconduct, and that even when working for his old employers, he could not do his work properly. He further found that the man was, by the loss of his eye, unable to obtain work as a boilermaker elsewhere, and so was put in the position of a casual labourer.

HELD—there was evidence to support the findings.

2716.—Cammell, Laird & Co. v. Platt (1908), 2 B. W. C. C. 368—C. A.

An injured unskilled workman, though able to do other work, could not do his former work, and claimed he was entitled to compensation as long as he was disabled from doing his former work.

HELD—an unskilled labourer is able to earn when he is capable of working, and the work need not be his former work.

2717.—Birmingham Cabinet Manufacturing Co. v. Dudley (1910), 102 L. T. 619; 3 B. W. C. C. 169—C. A.

Where a workman is injured by accident arising out of and in the course of his employment and compensation under the Workmen's Compensation Act, 1906, has been paid to him by his employers, and an application is made to the county court judge to terminate the weekly payment on the ground that the workman is able to earn as good wages as he was before the accident, the question is not whether his employers are paying him the same wages as he received before the accident, but whether he is left in such a position that in the open labour market his earning capacity may in the future be less than it was before the accident as the result of the accident.

Notes.—*Per* Fletcher Moulton, L.J. : “ The meaning of a ‘ suspensory award ’ is well ascertained and is very clear. It means that the consequences of the accident have not come to an end ; but that for the time being the workman is earning the same wages. The reason why this is so is because if the order is terminated, then if the consequences of the accident result in diminishing the workman's earning capacity, there is no power to award him compensation. In my opinion, however, where the consequences of the accident have not ceased—that is to say, where there is a continuance of the mutilation or other injury which has prevented the workman from earning his old wages—he has not lost his claim to compensation. In considering that question one ought not to consider the workman's condition at the time of the accident, but the position in which the labour market is when he recovers his power to work. In this case the workman was so mutilated that, under almost any conceivable circumstances, his earning power would be diminished, and therefore there should be an award of 1*d.* a week.”

2718.—Warwick Steamship Co. v. Callaghan (1912), 5 B. W. C. C. 283; [1912] W. C. Rep. 316—C. A.

A workman who had lost a finger by reason of an accident was paid, under an agreement, 16*s.* a week compensation by his employers until he recovered the partial use of his hand, the compensation then being reduced to 5*s.* a week. Later the employers offered him a job at full wages, which was accepted. Upon an application to terminate the payment the county court judge found that the man was permanently partially incapacitated and refused to alter his former award of 5*s.* a week.

HELD—there was evidence to support the finding.

2719.—Wilson v. Jackson's Stores, Ltd. (1905), 7 W. C. C. 122—C. A.

Where a workman's hand remains mutilated as the result of an injury the fact that he is earning more after the accident than he

was before does not entitle the employer to have the payment of compensation ended.

See also *Singer Manufacturing Co. v. Clelland* [2782]; *Freeland v. Macfarlane* [2702].

2720.—Cory Brothers & Co., Ltd. v. Hughes, [1911] 2 K. B. 738; 80 L. J. K. B. 1307; 105 L. T. 274; 27 T. L. R. 498; 4 B. W. C. C. 291—C. A.

Where an employer applies for the termination of an award of compensation, he must establish that the workman is not at that time under any incapacity by reason of the accident, and he does not discharge the *onus* cast upon him by merely proving that the workman is doing light work for him at the old rate of wages. The circumstances of each case must be looked at, applying ordinary common sense to the facts.

2721.—New Monckton Collieries v. Toone, [1913] W. C. & I. Rep. 425; 57 S. J. 753; 6 B. W. C. C. 660—C. A.

A miner met with an accident, causing injury to his back and involving complete incapacity for nearly two years, at the end of which he was put on light work on the surface. After a time he asked to be allowed to try his old work again, but owing to symptoms of mental infirmity he was prohibited from descending the mine. The employers applied to terminate or diminish the compensation on the ground of recovery; but their medical evidence only dealt with the workman's mental and not his physical condition, and the arbitrator was not satisfied with it, and dismissed the application without hearing the respondent's evidence.

HELD—that he was justified in so doing.

(3) *Suitable Employment.*

2722.—Eyre v. Houghton Main Colliery Co., [1910] 1 K. B. 695; 79 L. J. K. B. 698; 102 L. T. 385; 54 S. J. 304; 26 T. L. R. 302—C. A.

A coal miner whilst employed getting coal at the coal face in a colliery met with an accident. A piece of coal flew into his left eye, which became permanently injured. The sight was not destroyed, but the miner was rendered less fitted for his particular work than a one-eyed man. The colliery company, after having paid him compensation for several months, offered him work at the coal face at his old wages. On his declining the offer they ceased their payments, and he thereupon filed a request for arbitration for the determination of the question whether the work offered to him was suitable employment within Schedule I., clause 3, of the Workmen's Compensation Act, 1906. The county court judge on the medical evidence found that there was an appreciable increase of peril of injury to the remaining eye, and of injury generally, in working at the face with only one available eye. He was therefore of opinion

that the work offered was not quite suitable employment, and awarded compensation.

HELD (by Cozens-Hardy, M.R., and Fletcher Moulton, L.J.)—that “suitable employment” was a question of fact; and by Buckley, L.J., that it was a mixed question of fact and law; that the finding of the county court judge meant that the employment was not suitable, although nearly so, thus negating suitability, and that there was evidence to justify the finding, and therefore it could not be interfered with.

Notes.—*Per* Cozens-Hardy, M.R.: “What is the meaning of suitable employment? It seems to me that it is a question of fact in each case for the learned judge, having regard not merely to the physical condition of the man, but also to the nature and character of his occupation before the accident and the nature of the work which is offered after the accident.”

2723.—**Dinnington Main Coal Co., Ltd. v. Bruins** (1912), 5 B. W. C. C. 367; [1912] W. C. Rep. 173—C. A.

An engine driver in a colliery earning £2 a week met with an accident which caused the first finger of his left hand to become permanently stiff. He was paid compensation during total incapacity. Payment was stopped, and he brought proceedings, and was awarded 7s. 6d. a week on the grounds that although his former employment was too dangerous for him to resume, he was fit for some light work. He tried to obtain light work, but failed and applied for compensation to be increased. The employers submitted to an award of £1 a week. They then offered him different work, but at his old wages. The workman refused this unless the employers would guarantee to pay him his old wages for whatever work they might put him to. They refused to do this and applied to have the payments terminated on the ground that the man could do his full old work. The county court judge found that the man could do the old work, but that it would be dangerous for him; and that it was not suitable employment. He declined to reduce the compensation.

HELD—that there was evidence to support the finding.

Notes.—*Eyre v. Houghton Main Colliery Co.* [2722] followed.

2724.—**Elliott v. Curry and Dodd** (1912), 46 Ir. L. T. 72; 5 B. W. C. C. 584; [1912] W. C. Rep. 188—C. A. (Ir.).

A cartwright was injured while “topping” spokes, losing the sight of one eye. His employers offered him work which necessitated cutting out bolts with a hammer and chisel, but not topping spokes. The workman declined this work on the ground that it involved risk to the remaining eye. There was evidence that the work involved no more risk to a one-eyed man than a two-eyed man. The Recorder of Belfast found that the work offered was suitable.

HELD—that there was evidence to support the finding.

Notes.—All the judges in this decision agreed that the question was purely one of fact. *Eyre v. Houghton Main Colliery Co.* [2722] referred to.

2725.—*Wallis & Sons v. McNeice* (1912), 46 Ir. L. T. 202; 6 B. W. C. C. 445; [1912] W. C. & I. Rep. 372—C. A. (Ir.)

In June, 1910, a workman's hand was injured by accident arising out of and in the course of his employment as a carter in Belfast. On August 9th, 1911, he was awarded compensation by the Acting Recorder of Belfast at the rate of 8s. 6d. per week. An application for review was heard by the Recorder of Belfast on February 14th, 1912, when evidence was given that the workman was improving, and could do his old work as carter, and that his hand would improve by use, but that he was not fit for the full work of a carter. His employers, who at the time of the accident carried on business in Belfast, also had an extensive business in Dublin as carriers; and, having discontinued the Belfast branch, they offered the workman suitable work in Dublin at his old rate of wages. Since the accident he had been earning 6s. a week at light work, and had only applied for light jobs. The Recorder held that it was reasonable under the circumstances that the workman should be asked to go to Dublin, and that the employment offered was "suitable employment." He accordingly reduced the compensation to one penny a week.

HELD—that there was evidence to support the finding. The question of suitability of employment is entirely a question of fact.

2726.—*Ellis v. Knott* (1900), 2 W. C. C. 117; *Times*, April 9th, 1900—C. A.

A workman had his hand injured whilst working at a circular saw and received compensation of 18s. a week. The employer offered to take the workman back into his employment on the same work and at the same wages as before, but the workman, who was then earning 10s. a week at boot repairing, refused the offer. Upon an application to review, the county court judge said that the respondent could not work at the same employment at which he worked before the accident, or earn at that employment the wages he then earned; and that, in his opinion, he ought not to compel a man to go back to the employment to which he objected, even though the employer offered to pay him full wages. He further said that the sums now earned by the workman were no justification for reducing his weekly allowance.

HELD—that the decision of the county court judge was correct.

2727.—*Clarke, Nicholls and Coombs v. Knox* (1913), 57 S. J. 793; 6 B. W. C. C. 695—C. A.

A workgirl, seventeen years old, employed in a factory, lost one of the fingers of her left hand by accident while attending to a

machine and obtained an award of 3s. per week. Later the employers applied to terminate this award, and offered her suitable employment in their works, not involving any danger through machinery, at higher wages than her average wage before the accident. The county court judge refused to disturb the award.

HELD—that as he had not purported to exercise any discretion under the proviso to Schedule I. (16), and as there was no evidence upon which he could have done so, the award ought to be terminated, and a declaration of liability granted.

Notes.—*Vickers, Sons and Maxim, Ltd. v. Evans*, [1910] A. C. 444 [2814], referred to.

IV. "*Ability to do light work.*"

2728.—*Proctor & Sons v. Robinson*, [1911] 1 K. B. 1004; 80 L. J. K. B. 641; 3 B. W. C. C. 41—C. A.

Where, upon an application by employers to reduce the weekly compensation payable to a workman under the Workmen's Compensation Act, 1906, on the footing of total incapacity, it was proved that the man was prevented by the accident from doing the full work of an ordinary labourer, but that he could do some light work if he could obtain it, and there was no evidence that he could obtain any suitable employment:—

HELD—that it was incumbent on the employers to show what particular light work the workman could do and to give some evidence that he had a chance of obtaining that particular kind of work, and that in the absence of that evidence reduction ought to be refused.

2729.—*Cardiff Corporation v. Hall*, [1911] 1 K. B. 1009; 80 L. J. K. B. 644; 104 L. T. 467; 27 T. L. R. 339; 4 B. W. C. C. 159—C. A.

An award was made in favour of a workman on the basis that he was totally incapacitated. Subsequently the employers applied for a review, claiming a termination or, alternatively, a diminution, of the weekly payments. At the hearing of this application the evidence of the medical referee was to the effect that the workman, though not able for his former work, was able to do any form of light work. The workman gave evidence that he had made several unsuccessful applications for certain kinds of light work. Upon this evidence the county court judge held that there had been such a change of circumstances as entitled him to review the weekly payments, which he accordingly reduced from 9s. 2d. to 8s. a week.

HELD (Cozens-Hardy, M.R., *diss.*)—that it was competent to the county court judge to find that the circumstances had so altered as to justify a reduction.

Per Buckley, L.J.: Inability to earn, for the purposes of Schedule I., paragraph (3), of the Workmen's Compensation Act, 1906, is inability to get employment owing to some incapacity for work personal to the workman, to the exclusion of inability to get employ-

ment owing to the state of the labour market, and this construction applies to an application to review as well as to an original application for compensation. Consequently, proof that a workman has made repeated and unsuccessful efforts to obtain suitable employment does not of itself establish a right to compensation on the basis of total incapacity.

Notes.—*Clark v. Gas Light and Coke Co.* [2712]; *Proctor v. Robinson* [2728], and *Radcliffe v. Pacific Steam Navigation Co.* [2773] explained and distinguished. *Dobby v. Wilson, Pease & Co.* [2731] considered.

2730.—*Guest, Keen and Nettlefolds, Ltd. v. Winsper* (1911), 4 B. W. C. C. 289.

A workman employed in a steel rolling mill had the sight of his eye impaired by an accident and received compensation. Upon an application by the employers to review it appeared that he could only work efficiently on his old work with the aid of glasses. The judge found that the man was physically fit for work, but that he was not commercially “able to earn,” as a man with glasses was unlikely to obtain employment in a steel rolling mill. He dismissed the application to review.

HELD—that there was evidence of a change of circumstances which the judge ought to have considered, and that the case must go back to him.

Notes.—*Cardiff Corporation v. Hall* [2729] followed.

2731.—*Dobby v. Wilson, Pease & Co.* (1909), 2 B. W. C. C. 370—C. A.

Where a workman in receipt of reduced compensation and part wages was dismissed owing to slackness of trade :—

HELD—that the test of simple inability to get work on account of the labour market is wrong, the right test being inability to get work on account of disability.

Notes.—*Per Farwell, L.J.* : “The judge . . . has simply assumed that the employer is bound to give work when he has not got it, which is not the meaning of the Act.”

2732.—*Gray, Dawes & Co. v. Reed*, [1913] W. C. & I. Rep. 127 ; 108 L. T. 53 ; 6 B. W. C. C. 43—C. A.

An unskilled dock labourer while working at the docks met with a serious accident which rendered him unable to do the full work that he did before. For a considerable time his employers paid compensation to the workman under an agreement with him. Subsequently they offered to take him on as a labourer and gave him 8s. a day and to find him work for four or five days a week, but they warned him that he must not take that as a guarantee by them of perpetual employment. The workman refused to accept this and the employers

then applied under s. 16 of the First Schedule to the Workmen's Compensation Act, 1906, for an order to review the weekly payment payable to the workman, on the ground that there was a change in the circumstances because of their offer of light work to him.

HELD—that, having regard to the findings of the learned county court judge that the workman was fit for light work, and to the fact that the employers had offered the same to him, his Honour ought to have required evidence as to the probable amount of the wages which the workman could earn in order to ascertain what alteration should be made in the weekly payment (if any), and that therefore the case must go back to the learned judge.

Notes.—Cozens-Hardy, M.R., in judgment said : “ The employers came to the court to review the case. Now what is the burden put upon them ? They have, I take it, to show that the circumstances have changed, in this sense, that the man is no longer that which he was at first, namely, a man unable to earn anything worth mentioning in the market. . . . I desire to guard myself in saying what may happen in the case of a highly skilled labourer who is injured. It may well be that the highly skilled artisan could not fairly be required to say ‘ If I turn myself into an unskilled labourer, I might be able to earn a few shillings a week.’ But when you are dealing with an unskilled labourer with no special adaption to a branch of the unskilled labour market, I do not think the test ought to be, or ought to be considered to be : Can this man from his old employers, or in that particular branch of the labour market in which his employers are engaged, earn his own wages, or can he, indeed, earn any wages in that particular market ? ”

2733.—*Carlin v. Alexander Stephen & Sons, Ltd.*, [1911] S. C. 901 ; 48 Sc. L. R. 862 ; 5 B. W. C. C. 486—Ct. of Sess.

In an arbitration under the Workmen's Compensation Act, 1906, in which the employers craved a review of the weekly payment payable by them to an injured workman in respect of total incapacity, the arbitrator found in fact (1) that the workman was able for certain specified light work, (2) that the employers had offered him such light work, and (3) that there was no evidence to show how much the workman might earn by such light work.

HELD—that to found an award diminishing the weekly payment, a finding that the workman was able to earn a specific weekly wage at work which he was able to do was not necessary, and that such an award might proceed on (1) the finding as to the workman's capacity, and (2) the offer of light work by the employers.

Notes.—*Proctor & Sons v. Robinson* [2728] and *Cardiff Corporation v. Hall* [2729] considered.

2734.—*Smith v. Petrie* (1913), 50 Sc. L. R. 749 ; [1913] W. C. & I. Rep. 378—Ct. of Sess.

An employer agreed to pay an employee a weekly sum as compensation during total incapacity. The employee having subsequently

sought to have a memorandum of the agreement recorded, the employer objected on the ground that total incapacity had ceased and craved the arbiter to end or diminish the compensation. It was proved that the workman though unable to resume his former work was fit for some work, but no evidence was adduced to show what particular kind of employment he was fit for. The arbiter having dismissed the employer's application and granted warrant to record the memorandum, the employer appealed.

HELD—that the arbiter ought to have pronounced a finding whether the workman's wage-earning capacity was *nil*, or, if not, to what amount of compensation, if any, he was entitled.

Notes.—*Popple v. Frodingham Iron Co.*, [1912] 2 K. B. 141 [2920], distinguished. *M'Ewan v. Baird*, [1910] S. C., at p. 442 [2939]; *Hanley v. Niddrie and Benhar Coal Co.*, [1910] S. C. 875 [2206], referred to.

2735.—*Roberts and Ruthven, Ltd. v. Hall* (1912), 106 L. T. 769; 5 B. W. C. C. 331—C. A.

A member of the crew of a trawler had his arm injured at work. He received full compensation under an agreement. On his becoming able to do light work, the employers offered him some which he refused to accept. The employers thereupon applied for a review to diminish or terminate the payments. No evidence was given as to the exact amount of wages the workman was able to earn at the light work. The county court judge, acting partly upon his own local knowledge, diminished the payments.

HELD—that it is in the discretion of the judge to diminish without evidence of the actual amount the workman is able to earn.

2736.—*Anglo-Australian Steam Navigation Co., Ltd. v. Richards* (1911), 4 B. W. C. C. 247—C. A.

Upon an application to review it was proved that the workman was fit for light work and it was admitted that he had not attempted to get it, but no evidence was given that the man had been offered or could get such work. The county court judge reduced the payments from 15s. to 10s. a week.

HELD—that the judge was entitled on the evidence to make the reduction.

2737.—*McNamara & Co. v. Burt* (1911), 4 B. W. C. C. 151.

An injured workman in receipt of compensation was reported to be fit for light work by his own and the employers' doctors. He refused the light work offered by the employers thinking that it involved some heavy labour. Upon an application by the employers to review, the county court judge, finding that the man was fit for light work, and that the offer made it clear to the man that no heavy labour was involved, reduced the payment to 1d. a week.

HELD—that there was evidence to support the finding.

2738.—Osborne v. Tralee and Dingle Railway, [1913] 2 Ir. R. 133
47 Ir. L. T. 141; [1913] W. C. & I. Rep. 391—C. A.

A workman, at first totally incapacitated by an accident for the consequences of which the employers accepted liability, was paid by them half-wages for some months, when they sought to reduce the weekly rate of payment on the ground that total incapacity had ceased. The workman applied for arbitration, and was the only witness examined before the county court judge. He proved that he had tried to get employment and failed, and was admittedly not actually in any employment at the time of his application. He did not, however, give any estimate of what would be the value of his services if employed. No evidence of any kind was adduced by the employers. The county court judge awarded the applicant, until further order, a weekly sum which was equivalent to half the wages he was earning up to the time of the accident.

HELD—that the county court judge was within his jurisdiction in making the award, and that it should be affirmed.

MEDICAL EXAMINATION AFTER NOTICE OF ACCIDENT.

Schedule I., paragraph (4).—Where a workman has given notice of an accident, he shall, if so required by the employer, submit himself for examination by a duly qualified medical practitioner provided and paid by the employer, and, if he refuses to submit himself to such examination, or in any way obstructs the same, his right to compensation, and to take or prosecute any proceeding under this Act in relation to compensation, shall be suspended until such examination has taken place.

This paragraph and paragraphs (14) and (15) of Schedule I. govern the rights of the employer to demand a medical examination. Paragraph (14) applies to cases in which actual payments are being made under an award, or else under a recorded agreement. Paragraph (4) applies in other cases. Whenever the workman claims compensation the employer may require him to submit himself to a medical examination, and his right is not restricted to one examination after notice (*Major v. South Kirby, etc. Collieries, Ltd.* [2739]). The effect of these paragraphs are discussed and explained in that case. See also *Longhurst v. S.S. Clement (Owners)* [2740]. If the workman claims compensation, the employers may require him to submit to an examination although he has not given notice of the accident (*Osborn v. Vickers, Son and Maxim* [2741]). This case also decided that the employer cannot be compelled to pay the expense of the attendance at the examination of a medical practitioner on the workman's behalf. The workman has no absolute right to have his own medical adviser present at the examination, and it is a question of fact whether a request for the presence of the workman's medical attendant is under the circumstances of each case reasonable (*Morgan v. William Dixon, Ltd.* [2742]). Not only are the workman's rights to compensation suspended by a refusal, but they are forfeited (Schedule I., paragraph (20)). See also Schedule I., paragraphs (14) and (15), and Workmen's Compensation Rules, 1913, rule 58.

2739.—Major v. South Kirkby, Featherstone and Hemsworth Collieries, Ltd., [1913] 2 K. B. 145 ; 82 L. J. K. B. 452 ; [1913] W. C. & I. Rep. 305 ; 108 L. T. 534 ; 57 S. J. 244 ; 29 T. L. R. 223 ; 6 B. W. C. C. 169—C. A.

A workman was severely injured by an accident arising in the course of his employment. His employers admitted liability and paid him the weekly compensation to which he would have been entitled under the Workmen's Compensation Act, 1906, but by arrangement with him, and not under the Act. He was attended by the employers' doctors. At the end of three years upon their doctors' advice the employers stopped payment of the compensation. The workman then commenced proceedings under the Act, claiming compensation from the time when the payment was stopped. Thereupon the employers required the workman to submit himself to medical examination at their expense, but the workman refused.

HELD—that the proceedings must be suspended until the examination had taken place as provided by Schedule I., clause (4), of the Act.

Under Schedule I., clause (4), which provides for medical examinations between the accident and the award, the employer is not restricted to one examination only, immediately after notice.

Schedule I., clause (14), applies to medical examinations of workmen, whether they are receiving or entitled to receive weekly payments under the Act.

The regulations of the Secretary of State dated June 28th, 1907, as to times and intervals at which examinations may be required, are made applicable by Schedule I., clause (15), to both clauses (4) and (14) of Schedule I.

Notes.—The effect of paragraphs (4), (14) and (15) were discussed at length in the judgments in this case. With regard to the contention that there can only be one medical examination under paragraph (4), Cozens-Hardy, M.R., said : " I am unable to assent to to that view. It seems to me that unless we are compelled to come to such a conclusion common-sense indicates very strongly the opposite view. Take a simple case. There is an accident, and notice is given. The employer, if he is wise, will desire at all events to have an examination immediately after the accident. The claim may be suspended—I do not say for how long—but it may not be made immediately after the notice, and the vital point in the case may be, what is the condition of the man at the date when the claim is made ? How can that be ascertained if the employer is limited to one examination immediately after, or substantially immediately after, the accident has taken place ? " The Master of the Rolls went on to consider the effect of the paragraphs dealing with submission to a medical examination ; and said : " I think paragraph (14) applies to the case where the relation of judgment creditor and judgment debtor exists, and paragraph (4) applies to the case where that relation does not exist.

" Then it is said that paragraph (14) specifies a right to have

periodical examinations 'from time to time,' and we do not find those words in paragraph (4). That is quite a true observation, but then we must look at paragraph (15). . . . That seems to me to show that under paragraph (14), and also under paragraph (4), there may be more than one examination, because 'more frequent intervals may be prescribed,' and there is no ground for limiting those words of paragraph (15) to paragraph (15); in fact, I cannot read it that way." *Osborn v. Vickers, Son and Maxim* [2741] referred to.

2740.—*Longhurst v. S.S. Clement (Owners)*, [1913] W. C. & I. Rep. 312; 6 B. W. C. C. 218—C. A.

A workman was paid a weekly sum as compensation by his employers at the proper rate, not under the Act, but by arrangement, for a certain time, when payment was stopped. The workman then took proceedings claiming compensation under the Act. The employers thereupon requested the workman to submit himself to medical examination at their expense, but the workman refused.

HELD—that the proceedings must be suspended until the workman had submitted himself to medical examination under Schedule I. clause (4), of the Workmen's Compensation Act, 1906.

Notes.—*Major v. South Kirkby, Featherstone, and Hemsworth Collieries, Ltd.* [2739] followed.

2741.—*Osborn v. Vickers, Son and Maxim*, [1900] 2 Q. B. 91; 69 L. J. Q. B. 606; 82 L. T. 491; 16 T. L. R. 333—C. A.

Where proceedings by a workman for compensation under the Workmen's Compensation Act, 1897, are pending the employer may, under Schedule I., clause (3), require the workman to submit himself for examination by a duly qualified medical practitioner, notwithstanding that the workman has not given notice of the accident in respect of which the compensation is claimed.

An arbitrator has no power to make it a condition of an order that a workman shall submit himself for examination by a duly qualified medical practitioner that the employer shall pay the expense of the attendance at such examination of a medical practitioner on the workman's behalf.

2742.—*Morgan v. William Dixon, Ltd.*, [1912] A. C. 74; 81 L. J. P. C. 57; 105 L. T. 678; 28 T. L. R. 64; 56 S. J. 88; 5 B. W. C. C. 184; [1912] S. C. (H. L.) 1; 49 Sc. L. R. 45; [1912] W. C. Rep. 43—H. L. (Sc.).

Apart from special circumstances in any particular case, a workman who is claiming compensation for injury by accident, and who is called upon by his employers under Schedule I., paragraph (4), of the Workmen's Compensation Act, 1906, to submit himself for medical examination, has no absolute right to insist upon his own medical adviser being present at such examination. In each case it is a question of fact for the arbitrator to say whether a request for the attendance of the workman's medical adviser at the examination is reasonable.

Decision of the Court of Session, [1911] S. C. 403, affirmed (Lord Shaw *diss.*).

Notes.—Lord Shaw in his *dissentient* judgment applied the decision in *Devitt v. Owners of SS. Bainbridge* [2753], and expressed the opinion that the workman had a right in all ordinary circumstances to require that his medical attendant should be present at the examination, and that the burden was on the employers to show that this requirement was under the special circumstances so unreasonable as to deprive the workman of the right.

PAYMENT IN CASE OF DEATH.

Schedule I., paragraph (5). The payment in the case of death shall, unless otherwise ordered as hereinafter provided, be paid into the county court, and any sum so paid into court shall, subject to rules of court and the provisions of this schedule, be invested, applied, or otherwise dealt with by the court in such manner as the court in its discretion thinks fit for the benefit of the persons entitled thereto under this Act, and the receipt of the registrar of the court shall be a sufficient discharge in respect of the amount paid in :

Provided that, if so agreed, the payment in case of death shall, if the workman leaves no dependants, be made to his legal personal representative, or, if he has no such representative, to the person to whom the expenses of medical attendance and burial are due.

The object of this paragraph is to protect the dependants by providing (except as otherwise provided, see Schedule II., paragraph (16)) that in all cases of death the compensation money must be paid into court. The court will consider each case on its merits and decide whether to hand over a lump sum to the dependants or invest it for their benefit. The money must be invested as provided by paragraphs (10)—(13) of this Schedule. Even after the court has ordered a sum to be invested it has power to vary the order (see Schedule I., paragraph (9)). The proviso in paragraph (5) refers to the £10 which is payable under Schedule I. (1) (a) (iii.). The procedure as regards payment into court, investment, etc., is regulated by rules 60 and 61 of the Workmen's Compensation Rules, 1913.

2743.—Rhodes v. Soothill Colliery Co., [1909] 1 K. B. 191 ; 78 L. J. K. B. 141 ; 100 L. T. 14—C. A.

Where the employer has come to an agreement as to the amount of compensation, some of the dependants being infants, and pursuant to paragraph (4) of rule 56A of the Workmen's Compensation Rules, 1908, pays into court the agreed compensation, stating in the præcipe that there is no dispute as to the amount, but that no valid agreement can be come to by reason of the infancy of some of the dependants, and the registrar gives a receipt, the employer is free from all further liability. It is the duty of the registrar to look into the matter on behalf of the infants, and unless the registrar disapproves of the agreement as not being for their benefit it becomes binding on the infants, and the county court judge has no jurisdiction in the matter.

Notes.—As a dependant under legal disability could not make an absolute agreement, it was provided by rule 42 (6), now rule 44 (7), of the Workmen's Compensation Rules, 1913, following the decision in this case that "an agreement made by or on behalf of any person under any legal disability shall be conditional only unless and until a memorandum thereof has been recorded in accordance with the Act and these rules."

2744.—Johnson v. Oceanic Steam Navigation Co., Ltd. (1912), 5 B. W. C. C. 322 ; [1912] W. C. Rep. 162—C. A.

A workman met with an accident to his head in 1909. He got apparently perfectly well, and returned to his work. Two years later he died from the effects of an operation for abscess on the brain. The dependants having commenced compensation proceedings, the employers offered to pay *ex gratia* £10 and settle the claim. This sum was accepted, and thereupon the employers paid £10 into court under rule 56c of the Workmen's Compensation Rules, 1907—1912. The registrar was not satisfied, as two of the children were minors, that this sum was sufficient, and required the employers, before registering the memorandum, to furnish him with the reports of medical evidence which they had. The employers objected on the ground that the reports were privileged. The registrar thereupon referred the matter to the judge, who refused to register the memorandum.

HELD (without deciding whether the medical reports were privileged or not)—that there was ample evidence on which the registrar could decide the sum offered was inadequate.

Per Buckley, L.J.: The documents were privileged.

2745.—Smith v. Pearson and Shipley (1909), 2 B. W. C. C. 463—County Court.

HELD—that a dependant of a deceased workman, who was not himself in a position to maintain proceedings against the employer

owing to failure to make a claim within the proper time, was nevertheless entitled to claim against the compensation payable by the employer when this had been ascertained.

2746.—Harland and Wolff v. Radcliffe (1909), 43 Ir. L. T. 166 ; 2 B. W. C. C. 374—C. A. (Ir.).

Where employers have agreed as to the amount payable in respect of the death of one of their workmen, a request for arbitration naming them as respondents is not necessary to enable the money to be apportioned among the dependants of the deceased, but the money should be brought into court to the credit of the applicants and respondents for the purpose of distributing the same.

2747.—Clatworthy v. Green (1902), 86 L. T. 702 ; 50 W. R. 610 ; 66 J. P. 596 ; 18 T. L. R. 641—C. A.

A workman, who was accidentally killed in the course of his employment, died intestate, leaving a widow and children, who as his dependants were entitled to be paid compensation by his employer under the Workmen's Compensation Act, 1897. The amount of compensation was agreed upon between the widow and the employers, but the employers refused to pay this amount to her unless she first took out letters of administration. The widow refused this condition and commenced proceedings against the employers to obtain compensation under the Act. The employers paid the agreed amount of compensation into court. The county court judge ordered the employers to pay to the widow the costs of her application up to the date of the payment into court. Against this order the employers appealed.

HELD—that the employers were not entitled to insist on the widow taking out letters of administration before they paid over to her the agreed amount of compensation.

HELD ALSO—that the proceedings for compensation having been rightly commenced, the county court judge had jurisdiction to order the employers to pay the widow the costs of her application up to the date of the payment into court.

Notes.—Employers are now protected from risk by the provision in paragraph (5) of Schedule I. that the receipt of the registrar shall be a sufficient discharge in respect of the amount paid in. The employers' only duty is to pay the proper amount into court, for the amount payable to each dependant can apparently only be settled by arbitration. See Schedule I. (8).

2748.—Thompson & Co. v. Ferraro (or Pitt-Taylor) (1913), 6 B. W. C. C. 461 ; 57 S. J. 479—Bailhache, J.

A memorandum of an agreement as to a lump sum had been recorded in favour of the widow of a deceased workman. A firm of shipowners, the employers, sought to pay the amount into court. Form 53, which, by rule 56A (4), must accompany such payment, requires that it shall be signed by the employers or their solicitors.

In this case the form was signed by "The Shipping Federation, Ltd., as agents for the employers." The registrar refused to accept the amount unless the form were strictly followed with regard to signature, and on the widow levying execution the employers brought an action for damages against the registrar.

HELD—the registrar was wrong in refusing the form signed in this way. Form 53 was not an inflexible form, and was to be followed only so far as the circumstances of the case would permit. Judgment for plaintiffs. No costs.

Notes.—See now Workmen's Compensation Rules, 1913, Form 54, and rule 60 (4).

See also *Manchester v. Carlton Iron Co., Ltd.* [2553], *Skipper v. Nicholson* [2554], and *Ivey v. Ivey* [2749].

SCHEDULE I., PARAGRAPHS (6) TO (13).

Transfer of Money from one Court to another.

Schedule I., paragraph (6).—Rules of court may provide for the transfer of money paid into court under this Act from one court to another, whether or not the court from which it is to be transferred is in the same part of the United Kingdom as the court to which it is to be transferred.

[For procedure, see rule 91, Workmen's Compensation Rules, 1913.]

Order of Weekly Payment into Court.

Schedule I., paragraph (7).—Where a weekly payment is payable under this Act to a person under any legal disability, a county court may, on application being made in accordance with rules of court, order that the weekly payment be paid during the disability into court, and the provisions of this schedule with respect to sums required by this schedule to be paid into court shall apply to sums paid into court in pursuance of any such order.

[The provisions in paragraphs (5), (9) and (10)—(13) of this Schedule apply to this paragraph. For procedure, see rule 63, Workmen's Compensation Rules, 1913.]

Determining Dependants and Distribution of Compensation.

Schedule I., paragraph (8).—Any question as to who is a dependant shall, in default of agreement, be settled by arbitration under this Act, or, if not so settled before payment into court under this schedule, shall be settled by the county court, and the amount payable to each dependant shall be settled by arbitration under this Act, or, if not so settled before payment into court under this schedule, by the county court. Where there are both total and partial dependants nothing in this schedule shall be construed as preventing the compensation being allotted partly to the total and partly to the partial dependants.

[For procedure, see rule 5, Workmen's Compensation Rules, 1913.]

Power to Vary Orders.

Schedule I., paragraph 9.—Where, on application being made in accordance with rules of court, it appears to a county court that, on account of neglect of children on the part of a widow, or on account of the variation of the circumstances of the various dependants, or for any other sufficient cause, an order of the court or an award as to the apportionment amongst the several dependants of any sum paid as compensation, or as to the manner in which any sum payable to any such dependant is to be invested, applied, or otherwise dealt with, ought to be varied, the court may make such order for the variation of the former order or the award, as in the circumstances of the case the court may think just.

[For procedure, see rule 64, Workmen's Compensation Rules, 1913.]

2749.—*Ivey v. Ivey*, [1912] 2 K. B. 118; 81 L. J. K. B. 819; 106 L. T. 485; 5 B. W. C. C. 279; [1912] W. C. Rep. 293—C. A.

A workman having met with a fatal accident, the arbitrators under the Workmen's Compensation Act, 1906, awarded £292 1s. 7d. compensation to his dependants, his widow and four younger children, in certain proportions, of which the widow was to receive £102 1s. 7d. The money was ordered to be paid to trustees and fortnightly payments were made to the widow. She died intestate leaving £72 18s. 2d. in the hands of the trustees, representing the unexhausted part of her share of the compensation. Her next of kin claimed the money on the ground that it was vested in her and undisposed of. Two of the dependent children applied to the arbitrators for an order under Schedule I., paragraph (9), of the Act for the variation of the award and an order that the £72 18s. 2d. should be apportioned between them.

HELD—that the circumstances of the applicants had been varied by the death of the widow; that paragraph (9) applied to cases where a dependant had died; and that the arbitrators had power to vary the award.

Investment of Money in Court.

Schedule I., paragraphs (10) to (13).—(10) Any sum which under this schedule is ordered to be invested may be invested in whole or in part in the Post Office Savings Bank by the registrar of the county court in his name as registrar.

(11) Any sum to be so invested may be invested in the purchase of an annuity from the National Debt Commissioners through the Post Office Savings Bank, or be accepted by the Postmaster-General as a deposit in the name of the registrar as such, and the provisions of any statute or regulations respecting the limits of deposits in savings banks, and the declaration to be made by a depositor, shall not apply to such sums.

(12) No part of any money invested in the name of the registrar of any county court in the Post Office Savings Bank under this Act

shall be paid out, except upon authority addressed to the Postmaster-General by the Treasury or, subject to regulations of the Treasury, by the judge or registrar of the county court.

(13) Any person deriving any benefit from any moneys invested in a post office savings bank under the provisions of this Act may, nevertheless, open an account in a post office savings bank or in any other savings bank in his own name without being liable to any penalties imposed by any statute or regulations in respect of the opening of accounts in two savings banks, or of two accounts in the same savings bank.

MEDICAL EXAMINATION DURING PAYMENTS.

Schedule I., paragraphs (14) and (15).—(14) Any workman receiving weekly payments under this Act shall, if so required by the employer, from time to time submit himself for examination by a duly qualified medical practitioner provided and paid by the employer. If the workman refuses to submit himself to such examination, or in any way obstructs the same, his right to such weekly payments shall be suspended until such examination has taken place.

(15) A workman shall not be required to submit himself for examination by a medical practitioner under paragraph (4) or paragraph (14) of this schedule otherwise than in accordance with regulations made by the Secretary of State, or at more frequent intervals than may be prescribed by those regulations.

Where a workman has so submitted himself for examination by a medical practitioner, or has been examined by a medical practitioner selected by himself, and the employer or the workman, as the case may be, has within six days after such examination furnished the other with a copy of the report of that practitioner as to the workman's condition, then, in the event of no agreement being come to between the employer and the workman as to the workman's condition or fitness for employment, the registrar of a county court, on application being made to the court by both parties, may, on payment by the applicants of such fee not exceeding one pound as may be prescribed, refer the matter to a medical referee.

The medical referee to whom the matter is so referred shall, in accordance with regulations made by the Secretary of State, give a certificate as to the condition of the workman and his fitness for employment, specifying, where necessary, the kind of employment for which he is fit, and that certificate shall be conclusive evidence as to the matters so certified.

Where no agreement can be come to between the employer and the workman as to whether or to what extent the incapacity of the workman is due to the accident, the provisions of this paragraph shall, subject to any regulations made by the Secretary of State, apply as if the question were a question as to the condition of the workman.

If a workman, on being required so to do, refuses to submit himself for examination by a medical referee to whom the matter has been so referred as aforesaid, or in any way obstructs the same, his right to compensation and to take or prosecute any proceeding under this Act in relation to compensation, or, in the case of a workman in receipt of a weekly payment, his right to that weekly payment, shall be suspended until such examination has taken place.

Rules of court may be made for prescribing the manner in which

documents are to be furnished or served and applications made under this paragraph and the forms to be used for those purposes and, subject to the consent of the Treasury, as to the fee to be paid under this paragraph.

The effect of these paragraphs is considered in the headnote to paragraph (4) of this Schedule (see also *Major v. South Kirkby Collieries* [2739], and the other cases inserted under paragraph (4)).

Where the workman refuses to submit to or obstructs the medical examination his right to compensation is suspended until the examination has taken place. Thus under the old Act it was held that there was obstruction where the workman went to Australia without notifying his employers or leaving any address (*Finnie v. Duncan* [2750]); but that there was no obstruction where a workman who had left Scotland to live in Ireland refused to return to Scotland to be examined, but offered to submit himself to a medical examination in Ireland (*Baird v. Kane* [2751]). See now Schedule I., paragraph (18), on this point). There will be a refusal to submit where the workman refuses to be examined unless the examination takes place at his solicitor's office or in his solicitor's presence (*Warby v. Plaistowe & Co.* [2752]); but there will be no refusal where the workman demands the presence of his own doctor at the examination (*Devitt v. Owners of S.S. Bainbridge* [2753]), nor where the workman refuses to be examined at the residence of his employer's medical man, but offers to submit himself for examination at his own doctor's (*Harding v. Royal Mail Steam Packet Co.* [2754]).

The certificate of the medical referee is conclusive (*Sapcote & Sons v. Hancox* [2755]). *Ferrier v. Gourlay Brothers & Co.* [2756] and other cases are inserted on this point. But the certificate is only conclusive as to the man's physical condition at the time when it is given. It is only a piece of evidence, and does not bar arbitration proceedings otherwise competent and lawful (*King v. United Collieries, Ltd.* [2759]). Thus although the report is final as to the man's physical condition, it is not final as to his earning capacity (*Arnott v. Fife Coal Co., Ltd.* (No. 1) [2760]; *Cruden v. Wemyss Coal Co.* [2761]; but see *Gray v. Shotts Iron Co.* [2762]). Where the workman contends that since the date of the medical examination he has again become incapacitated as a result of the accident the onus will be upon him of proving that the supervening incapacity was due to the accident (*M'Ghee v. Summerlee Iron Co.* [2763]). The report of a medical referee may be sent back to him by the arbitrator for explanation if it is ambiguous (*Kennedy v. Dixon* [2764]). As to the power of the arbitrator to hear an application to terminate the compensation, see *M'Ghie v. United Collieries, Ltd.* [2765]. For procedure see Workmen's Compensation Rules, 1913, rules 57, 58 and 98.

The cases are divided as follows :—

- I. Refusal to Submit to or Obstruction of Medical Examination.
- II. Certificate Conclusive Evidence.
- III. Miscellaneous.

I. Refusal to Submit to or Obstruction to Medical Examination.

2750.—Finnie v. Duncan (1904), 7 F. 254; 42 Sc. L. R. 192—Ct. of Sess.

An injured workman in receipt of weekly payments under the Act went to Australia without intimating to his employers that he was going or leaving any address.

HELD—that he was obstructing medical examination within the meaning of paragraph (11) of the First Schedule of the Act.

Notes.—See now Schedule I., paragraph (18) of the present Act which provides for cases of workmen ceasing to reside in the United Kingdom.

2751.—Baird v. Kane (1905), 7 F. 461; 42 Sc. L. R. 347—Ct. of Sess.

A workman who was receiving weekly payments as compensation under the Act, and who had twice submitted himself for examination by a medical practitioner provided by the employers, and being certified not to have recovered, immediately after the second examination went to Ireland to reside with his father. About two months thereafter he was again required to submit himself at Glasgow for examination by the employers' medical man. He offered to submit himself to a medical man near the place where he was residing in Ireland, but he refused to come to Glasgow for examination unless his expenses were paid.

HELD—that the workman had not refused to submit himself to medical examination or obstructed the same within the meaning of paragraph (11), Schedule I. of the Act, and that the employers were not entitled to suspend payment of his compensation.

Notes.—*Finnie v. Duncan* [2750] distinguished on the ground that in that case the man had gone to Australia without leaving his address with anybody, leaving his wife at home, and neither his wife nor his former law agents were able to find out where the man had gone.

2752.—Warby v. Plaistowe & Co. (1910), 4 B. W. C. C. 67—C. A.

A solicitor's office is not in ordinary circumstances a proper place at which to hold a medical examination of a workman.

A workman in receipt of compensation under the Act was required by his employers to submit himself for examination by a certain duly qualified medical practitioner. The workman refused to do so unless the examination was at his solicitor's office or in his solicitor's presence. The employers repeated their request, but stated that the workman's medical adviser might attend at the examination. The workman again refused unless his conditions were complied with.

HELD (on these facts)—that there was a refusal to submit to examination within Schedule I., paragraph (14).

Notes.—*Harding v. Royal Mail Steam Packet Co.* [2754] referred to. Cozens-Hardy, M.R., in judgment said: "The Act gives the employer, therefore, the sole right to select the medical man who shall examine the workman; it does not give the workman any right to impose conditions such as are claimed here."

2753.—*Devitt v. Owners of S.S. Bainbridge*, [1909] 2 K. B. 802; 78 L. J. K. B. 1059; 101 L. T. 299—C. A.

A workman who is willing to submit himself for examination by the employer's medical practitioner in the presence of his own doctor, but not otherwise, does not "refuse" to submit himself to examination or "in any way obstruct the same" within the meaning of clause (14) of Schedule I. to the Workmen's Compensation Act, 1906.

2754.—*Harding v. Royal Mail Steam Packet Co.* (1910), 4 B. W. C. C. 59—C. A.

A workman refused to attend for medical examination at the residence of the employers' medical man, but offered to submit himself to examination at the surgery of his own doctor.

HELD (on the facts)—that there was no refusal to submit within Schedule I., paragraph (14).

Notes.—*Per Cozens-Hardy, M.R.*: "There is no law prescribing where the examination should take place. As long as the man offers to submit himself to examination, and is not unreasonable in saying where it shall take place, he cannot be punished in the manner in which he would be if he acted otherwise."

II. *Certificate Conclusive Evidence.*

2755.—*Sapcote & Sons v. Hancox* (1911), 4 B. W. C. C. 184—C. A.

Employers applied to review payments under a registered agreement, putting in a certificate of a medical referee, obtained in accordance with Schedule I., paragraph (15), of the Workmen's Compensation Act, 1906, as proof that the workman was fit to work. The man tendered medical evidence in contradiction, but the county court judge rejected it, on the ground that the certificate was conclusive.

HELD—that the evidence was rightly rejected, the certificate being conclusive.

2756.—*Ferrier v. Gourlay Brothers & Co.* (1902), 4 F. 711—Ct. of Sess.

The report by a medical referee under paragraph (13) of Schedule II. to the Act is conclusive evidence of the condition of the workman to whom it refers.

In an application by an employer for review of an order for weekly payments of 6s. 3d. to an injured workman, the sheriff remitted to the medical practitioner appointed by the Secretary of State to

report as to the workman's condition. The report bore that the power of vision of the right eye was permanently reduced by one-half, and that the left eye was quite sound, and that in the opinion of the reporter "he will never be able for any work for which unimpaired vision is essential, but he is quite able to undertake his ordinary work as a labourer." The sheriff, without further proof, reduced the compensation to 5s. a week.

HELD (Lord Young, *diss.*)—that the report was conclusive evidence that the incapacity of the workman arising from his injuries had ceased to the effect of disentitling him to a continuance of the compensation at the present rate, and remitted to the sheriff to reduce the compensation to one penny per week until further orders.

Notes.—*M'Avan v. Boase Spinning Co.* [2758] applied. *Irons v. Davis and Timmins* [2701] referred to.

2757.—*Bryce v. Connor* (1904), 7 F. 193; 42 Sc. L. R. 154—Ct. of Sess.

A mason's labourer, sixty-six years of age, whose left eye had been injured was awarded under the Act the maximum weekly payment for total incapacity. Prior to an application by the employers to have the payment diminished, the workman was examined by one of the medical men appointed by the Secretary of State. The medical certificate stated that the workman's right eye was healthy and the vision good, but that the left eye was seriously defective; "his disability is, however, at present great enough to unfit him for his usual occupation of a mason's labourer though I am of opinion he is quite fit for any work where he would not have to exercise for the safety of life or limb that nice discrimination as to distances for which the sight of two eyes is necessary."

HELD (Lord Young *diss.*)—(1) that the medical certificate under paragraph 11 was conclusive evidence of the workman's condition.

(2) That, as the certificate stated that the workman was unfit for his usual occupation, although fit for work of a particular character, and as his employers did not state or offer to prove that he could get such employment, the sheriff was entitled to decide as he did without further evidence that the workman's earning capacity had not increased to such an extent as to justify a reduction or termination of the previous award.

Notes.—*M'Avan v. Boase Spinning Co.* [2758] explained and applied.

2758.—*M'Avan v. Boase Spinning Co.* (1901), 3 F. 1048; 38 Sc. L. R. 772—Ct. of Sess.

The certificate given by a medical referee under Schedule I., paragraph (11) of the Act stated that a workman who was in receipt of weekly payments under the Act had recovered from the injuries in respect of which the payments were made, and that although he was suffering from partial disability for work, such disability was not

connected with the injuries, but was "the result of deficient natural vigour of constitution, together with advancing years."

HELD (Lord Young *diss.*)—that such certificate was conclusive against any further claim by the workman for compensation under the Act.

2759.—King v. United Collieries, Ltd., [1910] S. C. 42 ; 47 Sc. L. R. 41 ; 3 B. W. C. C. 546—Ct. of Sess.

The employers of a workman paid him compensation for injuries under an unrecorded agreement until October 20th, 1908, when they refused to make further payments on the ground, disputed by the workman, that the incapacity had ceased. On a remit to a medical referee under paragraph (15) of Schedule I. to the Workmen's Compensation Act, 1906, the referee reported that incapacity ceased at October 20th, 1908. The workman acquiesced in the non-payment of compensation until May 8th, 1909, at which date he alleged that he again became incapacitated owing to the same injury. No application was ever made by the employers for an order to end the compensation. In an application by the workman against his employers for an award to fix the amount of compensation due in respect of the alleged supervening incapacity :

HELD—that the certificate of the medical referee did not bar the application.

Notes.—*Per* Lord Ardwell : "The workman acquiesced in non-payment until May 8th, 1909. The matter went to sleep, so to speak, just as happened in *Dempster v. Baird*, [1908] S. C. 722 [2219], and no application was made by the employers to have the compensation ended.

"Now, if they had made such an application the sheriff might or might not have ended the compensation. It was pleaded to us that necessarily he must have done so. I do not think that there is anything that can be predicted as necessarily certain to happen under this Act or in any proceedings under it. At all events, the application was not made, and accordingly there is no judicial finding, award or judgment showing that the compensation was ended. We have simply the medical referee's report ; and to hold that arbitration proceedings, otherwise competent and lawful, can be barred by a medical referee's report (which is only a piece of evidence) seems to me to be a proposition which cannot be maintained under this Act or otherwise."

2760.—Arnott v. Fife Coal Co., Ltd. (No. 1), [1911] S. C. 1029 ; 48 Sc. L. R. 828 ; 4 B. W. C. C. 361—Ct. of Sess.

In an application for review of compensation paid to a miner, who had received an injury resulting in the loss of an eye, a remit was made to a medical referee in terms of Schedule I., paragraph (15), of the Workmen's Compensation Act, 1906. The referee reported that the miner was "as fit as any other one-eyed man to resume his work underground." The miner having moved for a proof as to his earning capacity, the arbitrator refused the motion and ended the compensa-

tion, on the ground that the referee's report was final, and that it meant that the miner's incapacity had ceased.

HELD—that the report in question, though final as to the miner's physical condition, was not final as to his earning capacity, and case remitted to the arbitrator to allow a proof on that matter.

2761.—*Cruden v. Wemyss Coal Co.*, [1913] S. C. 534; 50 Sc. L. R. 344; [1913] W. C. & I. Rep. 188—Ct. of Sess.

In an application to end the compensation payable to a miner who had received an injury to his eye, the question of his condition and his fitness for employment was referred to a medical referee under paragraph (15) of Schedule I. to the Workmen's Compensation Act, 1906. The medical referee reported that "his condition is such that I consider he ought now to be fit to resume his ordinary work as a miner below ground." The miner having lodged answers in which he averred that he had not yet recovered from the effects of the accident and that his earning capacity was not restored, the court allowed a proof as to the miner's wage-earning capacity, but excluded all evidence with regard to his physical condition and physical fitness for his ordinary work as a miner below ground, as on those points the medical referee's certificate was final.

Notes.—*Arnott v. Fife Coal Co., Ltd.*, [2760] and [2603], discussed.

2762.—*Gray v. Shotts Iron Co.*, [1912] S. C. 1267; 49 Sc. L. R. 906; 6 B. W. C. C. 287; [1912] W. C. Rep. 359—Ct. of Sess.

By agreement between a coal miner, who had received an injury to his thumb and was receiving compensation, and his employers the question of the workman's capacity to resume his former employment was referred to a medical referee under paragraph (15) of Schedule I. to the Workmen's Compensation Act, 1906. The medical referee reported that the workman was "quite fit to resume his ordinary employment as a coal miner, having recovered from" the injury. The employers thereupon applied to have the compensation ended, when the workman lodged answers in which he averred that having returned to work he had ascertained "that his earning ability has been considerably reduced from the effects of his injury" and maintained that he was still entitled to partial compensation. The arbitrator having ended the compensation the workman appealed and asked leave to lead evidence in support of his averments.

HELD (dismissing the appeal)—that as the medical referee's report was final and was from its terms conclusive as to the question raised by the workman's averments, proof of these averments was inadmissible.

Quære, whether a proof might not have been admissible if the workman had averred that owing to the consequences of the accident he had been unable to obtain employment.

Notes.—*Ball v. Hunt*, [1912] A. C. 496 [2594], and *Macdonald or Duris v. Wilsons and Clyde Coal Co.* [2770], distinguished; and

observed that where a medical referee's report is not from its terms conclusive a proof may be admissible.

Arnott v. Fife Coal Co., Ltd. [2760] and [2603]; *Boag v. Lochwood Collieries, Ltd.* [2771]; *Rosie v. Mackay* [2781], referred to.

2763.—*M'Ghee v. Summerlee Iron Co., Ltd.*, [1911] S. C. 870; 48 Sc. L. R. 807; 4 B. W. C. C. 424—Ct. of Sess.

Under a remit by parties to a medical referee to report on the condition of a workman, who had been injured and who was in receipt of compensation, the referee reported that he was fit for his former work. Thereafter the employers presented an application for review of the compensation, which was opposed by the workman on the ground that, since the date of his examination by the medical referee, he had again become incapacitated as a result of the accident.

HELD—that the *onus* was on the workman of proving that the supervening incapacity was due to the accident.

Notes.—In his judgment Lord Dundas said: "It is no doubt true that when a master presents an application to have compensation ended or diminished, the *onus* is upon him to show that incapacity has ceased in whole or in part. Here the master was able to produce along with his application the finding of the medical referee, conclusive at its date, that on February 14th, 1910, the man was fit for work as a miner. I think the *onus* then fell upon the workman to show that the supervening incapacity was due to the original accident, just as in an original application he must show that his injury was due to an accident arising out of and in the course of his employment." *M'Callum v. Quinn* [1909] S. C. 227 [2818], distinguished. *King v. United Collieries, Ltd.* [2759] referred to.

III. *Miscellaneous.*

2764.—*Kennedy v. Dixon*, [1913] S. C. 659; 50 Sc. L. R. 453; [1913] W. C. & I. Rep. 333; 6 B. W. C. C. 434—Ct. of Sess.

The report of a medical referee, to whom a remit has been made under the Workmen's Compensation Act, 1906, Schedule I., paragraph 15, may competently be sent back to him by the arbitrator for explanation if it is ambiguous or unintelligible.

2765.—*McGhie v. United Collieries, Ltd.* (1910), 47 Sc. L. R. 751; [1910] S. C. 927—Ct. of Sess.

Upon the report of a medical referee, that a workman to whom compensation was being paid had recovered, the employers lodged a minute craving the court to terminate the payment of compensation. There was no memorandum of agreement. The sheriff-substitute holding that there was no process before him, and that accordingly he could not act until a separate application to end the compensation was made by the employers, dismissed the application.

HELD (on appeal)—that the application "to end the compensation" was properly before the sheriff-substitute as arbitrator and

that accordingly he ought to have entertained it and disposed of the case on its merits.

[The following cases were decided under the old Act and are now no longer of any importance: *Neagle v. Nixon's Navigation Co., Ltd.*, [1904] 1 K. B. 339; *Edwards v. Guest, Keen and Nettlefolds*, [1904] 1 K. B. 339; *Niddrie and Benhar, Ltd. v. M'Kay* (1903), 5 F. 1121; *Davidson v. Summerlee and Mossend Iron Co.* (1903), 5 F. 991.]

REVIEW.

Schedule I., paragraph (16).—Any weekly payment may be reviewed at the request either of the employer or of the workman, and on such review may be ended, diminished, or increased, subject to the maximum above provided, and the amount of payment shall, in default of agreement, be settled by arbitration under this Act :

Provided that where the workman was at the date of the accident under twenty-one years of age and the review takes place more than twelve months after the accident, the amount of the weekly payment may be increased to any amount not exceeding 50 per cent. of the weekly sum which the workman would probably have been earning at the date of the review if he had remained uninjured, but not in any case exceeding one pound.

Paragraph (16) of Schedule I. contains the procedure for varying an award for compensation. The object of the paragraph is that if the workman gets better in health and earns better wages the employer may apply for a review, and if on the other hand the workman gets worse and might be able to earn less wages he may make an application. The cases will be considered under the following scheme of arrangement :—

Firstly, the existence of a “ question ” is not a condition precedent to an application for review, although it is necessary that a “ question ” should have arisen between the parties where an original application for arbitration is made ; see s. 1, sub-s. 3 (Tyne Tees Shipping Co. v. Whitlock [2766]).

Secondly, a change in circumstances since date of award is necessary (Crossfield v. Tanian [2767] ; Cox v. Braithwaite and Kirk [2768]). But it is not necessary that there should be a change in the physical condition of the workman, for if the workman can show that he is unable to get employment owing to his injury this will be a sufficient change of circumstances to warrant an application for review (*Sharman v. Holliday and Greenwood, Ltd.* [2769] ; *Macdonald v. Wilsons and Clyde Coal Co.* [2770], overruling *Boag v. Lochwood Collieries* [2771]). There will be a change of circumstances when it transpires that the original award or agreement was based on mistaken medical evidence (*Mead v. Lockhart* [2772]). The amount which the workman is able to earn at the date of the application to review cannot be *res judicata* (*Radcliffe v. Pacific Steam Navigation Co.* [2773] ; *Cawdor and Garnant Collieries v. Jones* [2774]), for each application must be heard upon its merits (*Thranmere Bay Development Co. v. Brennan* [2775]). There will be a change in circumstances where expenses of the workman, e.g., for fares, which were taken into

account in the original award, no longer exist (*Taff Vale Railway Co. v. Lane* (No. 2) [2776]).

Thirdly, reduction of payments to nominal sum. This process is usually resorted to where the arbitrator is of opinion that the workman, although earning the same wages as before the accident, may not be able to earn such wages if he has to compete in the open labour market, or where he is of opinion that fresh symptoms of incapacity may subsequently develop. That the arbitrator has power to make such a suspensory award was only finally settled in 1912 by the House of Lords in *Taylor v. London and North Western Railway Co.* [2777], which overrules *Rosie v. Mackay* (No. 2) [2781] and *Clelland v. Singer Manufacturing Co.* [2782] (see *Weir v. North British Railway Co.* [2780], *Dempsey v. Caldwell & Co.* [2778], and *S.S. Tynron v. Morgan* [2779]). A suspensory award may be made on an original application for arbitration (*Griga v. S.S. Harelda* [2783]; *Green v. Cammell Laird* [2784]).

Fourthly, termination of weekly payments. An award permanently ending payments ought to be made where the workman has fully recovered from the effects of the accident, and there is no likelihood of a recurrence of the incapacity (*Husband v. Campbell* [2785]; *Hargreave v. Haughhead Coal Co.* [2786]). But payments should not be terminated where there is evidence that there may be future incapacity (*Braithwaite and Kirk v. Cox* [2787]). It is a question of fact for the arbitrator to decide whether the payments should be terminated or a suspensory award made (*Cranfield v. Ansell* [2788]; *Edmondsons v. Parker* [2789]; *Wheeler, Ridley & Co. v. Dawson* [2795]; *Simpson v. Byrne* [2796], and several other cases are inserted on this point). An award terminating the weekly payments is final, thus the workman may not at some subsequent date claim compensation for supervening incapacity due to the original injury (*Nicholson v. Piper* [2798]; *Cadenhead v. Ailsa Shipbuilding Co.* [2799]).

Fifthly, review under unrecorded agreements. An application to review may be made where there is only a verbal agreement of which no memorandum has been recorded (*Southhook Fireclay Co. v. Laughland* [2800]; *Nelson v. Summerlee Iron Co.* [2801]). It would appear that a review of weekly payments may take place by agreement between the parties, and that such an agreement may be implied (*Bradbury v. Bedworth Coal and Iron Co.* [2802]).

Sixthly, time from which payments may be ended, diminished, or increased. The arbitrator is not bound to regard solely the state of the workman's capacity at the date of the hearing of the application, but may make the order to date from the filing of the application or any subsequent date up to the hearing (*Morton v. Woodward* [2803]).

On a simple application by the employers seeking to terminate a weekly payment on the ground that the workman's incapacity has ceased, the arbitrator has no jurisdiction to make an award that the incapacity ceased at a date antecedent to the date of the application (*Upper Forest and Western Steel and Tinplate Co. v. Thomas* [2804]; *Charing Cross, Euston and Hampstead Railway v. Boots* [2805]). But *semble* where the application to review asks in express terms for termination from a definite antecedent date termination may be ordered from that date (see *per* Cozens-Hardy, M.R., and

Kennedy, L.J., in *Charing Cross, Euston and Hampstead Railway v. Boots* [2805]). The arbitrator may not make a prospective award of so much a week for a certain time, and after that time a smaller sum (*Baker v. Jewell* [2806]; *Allan v. Spowart* [2807]; *Hull v. Brady* [2808]; see also *Newhouse v. Johnson* [2809]). The law in Scotland on this question was unsettled until the Court of Session, in *Donaldson v. Cowan*, expressed its approval of the principles laid down in *Morton v. Woodward* [2803], overruling *Steel v. Oakbank Oil Co.* [2811]; *Pumpherstons Oil Co. v. Cavaney* [2812]; *Baird v. Stevenson* [2813].

Seventhly, the weekly sum which the workman would probably have been earning. These words in the proviso to paragraph (16) are not limited to what the workman would probably have been earning in the employment of the same employer (*Vickers, Sons and Maxim v. Evans* [2814]). The maximum which may be awarded is 50 per cent. of the probable earnings (*Ambridge v. Good* [2815]). As to the effect of this part of paragraph (16) or paragraph (3) of Schedule I., see *Edwards v. Alyn Steel Tinplate Co.* [2816] and *Malcolm v. Bowhill* (No. 2) [2817].

Eighthly, the onus of proof. The onus is on the party seeking to terminate the award. Thus, where the workman is receiving payments under a registered memorandum of agreement, the employer will not be entitled to have such payments ended unless he proves that the workman has recovered (*M'Callum v. Quinn* [2818]; *Walton v. South Kirby, Featherstone and Hemsworth Colliery* [2819]). So also where the workman has completely recovered from the effects of an industrial disease, the payments must be ended, unless the workman can prove that there is a tendency to a recurrence of the disease due to the original attack (*Darroll v. Glasgow Iron and Steel Co.* [2820]).

The cases are divided as follows :—

- I. Existence of " Question " not a Condition Precedent to Application.
- II. Change in Circumstances since Date of Award necessary.
- III. Reduction of Payments to Nominal Sum.
- IV. Termination of Payments.
- V. Review under unrecorded Agreements.
- VI. Time from which Payments may be ended, diminished, or increased.
- VII. Weekly Sum which the Workman would probably have been Earning.
- VIII. Onus of Proof.

I. *Existence of "Question" not a Condition Precedent to Application.*

2766.—*Tyne Tees Shipping Co. v. Whitlock*, [1913] W. C. & I. Rep. 579; 109 L. T. 84; 57 S. J. 716; 6 B. W. C. C. 559—C. A.

Although it is a condition precedent to an application under s. 1 of the Workmen's Compensation Act, 1906, that a "question" should have arisen between employer and workman, there is no necessity for a question to have arisen between the parties before an application is made to review a weekly payment under s. 16 of the First Schedule to the Act.

Notes.—*Per Cozens-Hardy, M.R.* : "It has been again and again said that the jurisdiction given by s. 1, sub-s. 2, of the Act, presupposes the existence of 'questions' which have arisen in the proceedings. Those questions are defined to be these: Is the man a workman to whom the Act applies? What is the amount of the compensation to which he is entitled? What is the duration of the compensation to which he is entitled? The word 'duration' seems to me to mean, that the employer admits the accident; he admits the right to compensation from the accident, and he says: 'The period for which I am bound to pay compensation has expired; the right to the award has gone by, and the right to compensation has expired.'

"Now, this provision is to be found in s. 1, sub-s. 3, which is the sub-section dealing with the original application. Obviously on the face of it it is nothing more than that. What is the effect of an award? When I say 'award,' I mean a recorded agreement, which is exactly the same. I do not draw any distinction between them. It is this: An award of so many shillings per week during the workman's incapacity for work, it being inherent in the award that there is liberty to either party to apply to review and terminate the weekly payment under s. 16 of the First Schedule to the Act. That being so, I see no ground for the contention that on an application under s. 16 of the First Schedule—which is really an application for liberty to apply inherent in the award itself—there should be any necessity for a dispute to have arisen between the parties before the application was made." See also Workmen's Compensation Rules, 1913, rr. 8, 9; Appendix, Form 5.

II. *Change in Circumstances since Date of Award necessary.*

2767.—*Crossfield and Sons v. Tanian*, [1900] 2 Q. B. 629; 69 L. J. Q. B. 790; 82 L. T. 813; 48 W. R. 609; 16 T. L. R. 476—C. A.

Paragraph 12 of the First Schedule to the Workmen's Compensation Act, 1897, which provides that "any weekly payment may be reviewed at the request either of the employer or of the workman, and on such review may be ended, diminished, or increased," subject to a maximum provided in the Act, only applies to cases where there

has been a change in the circumstances since the date when the award for payment of a weekly sum to the workman has been made (Vaughan Williams, L.J., *hæsitante*).

2768.—Cox v. Braithwaite and Kirk (1911), 5 B. W. C. C. 648—C. A.

As the result of an accident, a riveter became blind in one eye. He received compensation until the wound had healed, and, on an application by the employers to terminate the payments, he was awarded a declaration of liability and payments were stopped. He was at this time quite able to do his old riveting work, and had been offered it by his employers, but had refused, as he was afraid of the remaining eye being injured. His employers found him painting work instead. He was, however, not able to earn his full wages at the painting work, and applied for an increase of compensation as from the date of the first review on this ground. There was evidence that the employers had repeated their offer to employ him at his old work, but that he had again refused. There was no change in the circumstances since the first review. The county court judge dismissed the application.

HELD—that the workman had failed to show that the county court judge was wrong in dismissing the application.

Notes.—*Braithwaite and Kirk v. Cox* [2787] referred to.

2769.—Sharman v. Holliday and Greenwood, Ltd., [1904] 1 K. B. 235; 73 L. J. K. B. 176; 90 L. T. 46; 68 J. P. 151; 20 T. L. R. 135—C. A.

A workman was accidentally injured in the course of his employment, and a memorandum of agreement was filed for the payment by the employers to the workman of a weekly sum of 15*s.* during incapacity. On an application by the employers for a review of the weekly payment on the ground that the workman was able to work, the county court judge, acting on the weight of the medical evidence, reduced the weekly payment to a penny, leaving it open to the workman to apply again. On an application by the workman for a further review, the county court judge refused to hear fresh medical evidence on behalf of the workman, and held that the matter was *res judicata*.

HELD—that the doctrine of *res judicata* was not applicable, and that the county court judge had jurisdiction to entertain the workman's application for a review.

Notes.—*Crossfield v. Tanian* [2767] discussed and distinguished. See also note to *Radcliffe v. Pacific Steam Navigation Co.* [2773].

2770.—Macdonald or Duris v. Wilsons and Clyde Coal Co., Ltd., [1912] A. C. 513; 81 L. J. P. C. 188; 106 L. T. 905; 28 T. L. R. 431; 56 S. J. 550; 5 B. W. C. C. 478; [1912] S. C. (H. L.) 74; 49 Sc. L. R. 708; [1912] W. C. Rep. 302—H. L. (Sc.).

The appellant, who had been injured by accident in the course of his employment with the respondents in 1909, received a weekly

payment under the Workmen's Compensation Act, 1906. In September, 1910, he was certified by the medical referee to be fit for light work, and he was given that class of work by the respondents, the weekly payment being reduced by agreement. In December, 1910, the respondents, who were reducing the number of their workmen, dismissed the appellant, who thereupon claimed a review of the weekly payment, alleging that though physically fit for work he was unable on account of his injuries to obtain any employment.

HELD—that the appellant was entitled to a review of the weekly payment if he could establish that his inability to obtain work was the consequence of the injuries he had sustained, and was not merely due to the state of the labour market.

Notes.—*Per* Earl Loreburn, L.C.: "Ought we to say that if a man, though physically fit for some work, is prevented by the consequence of the injury from obtaining it—in other words is disabled from obtaining wages—that nevertheless he is 'able to earn' wages, and is not under any incapacity for work? He is under an incapacity if his condition makes his labour unsaleable or saleable only at a less wage. In regard to the averment that he is 'unable to obtain work in the district,' I think it must be understood in the sense that he cannot get work suitable for his condition in any place within reasonable access."

Boag v. Lochwood Collieries, Ltd. [2771] overruled. *Ball v. William Hunt*, [1912] A. C. 496 [2594], followed.

2771.—*Boag v. Lochwood Collieries, Ltd.*, [1910] S. C. 51; 47 Sc. L. R. 47—Ct. of Sess.

In an application to the sheriff by a workman under clause 12 of Schedule I. to the Workmen's Compensation Act, 1897, to review and increase a weekly payment payable to him as partially incapacitated, under an agreement with his employers, the workman averred that he was entitled in law to be held as totally incapacitated in respect that his employers were unable to give him suitable light work, and that he was unable to obtain light employment elsewhere. The sheriff dismissed the application. On appeal:

HELD—that the application fell to be dismissed in respect that no relevant grounds for reviewing the weekly payments were set forth.

Notes.—This case is overruled by *Macdonald or Duris v. Wilsons and Clyde Coal Co.* [2770].

2772.—*Mead v. Lockhart, Ltd.* (1909), 2 B. W. C. C. 398—C. A.

A workman was injured by accident and received compensation. On an application to review in 1908, the judge, after hearing the medical evidence, awarded the payment of £1 a week. The employers made a further application to review in 1909, and tendered evidence to show that medical evidence given on the first application was inaccurate. The judge refused to admit the evidence, holding that the matter was *res judicata*.

HELD—that the evidence must be admitted.

Notes.—*Sharman v. Holliday and Greenwood* [2769] approved.

2773.—Radcliffe v. Pacific Steam Navigation Co., [1910] 1 K. B. 685; 79 L. J. K. B. 429; 102 L. T. 206; 54 S. J. 404; 26 T. L. R. 319—C. A.

On an application to review a weekly payment under clause 16 of Schedule I. to the Workmen's Compensation Act, 1906, the court is bound to consider the future earning power of the man as shown by the then existing circumstances, including any new evidence of inability to obtain employment arising from the injury caused by the accident. The amount of wages which the workman is able to earn at the date of the application to review can never, therefore, be considered as *res judicata*, even though there has been no change in his physical condition.

Notes.—Cozens-Hardy, M.R., in judgment, said: "It has been held, and I think rightly held, that an award stating that a man's wages at the date of the accident were *x* shillings cannot be reviewed on such a point (*Crossfield v. Tanian* [2767]). That is a positive fact, not admitting of a change of circumstances, and not a matter of opinion. The same consideration would prevent the reopening of an award finding that A. B. is not a dependant. On the other hand, it has been held that an award based upon medical opinion of a man's physical condition at one time in no way prevents a different award at a subsequent date when experience may have proved that the views of the doctors were wrong (*Sharman v. Holliday and Greenwood* [2769]). In the language of Lord Collins, 'I think there is a change of circumstances where subsequent experiment has shown that the previous opinion based on expert evidence was wrong.' " *Sharman v. Holliday and Greenwood* [2769] applied. *Clark v. Gas Light and Coke Co.* [2712]; *Nicholson v. Piper* [2798], referred to.

2774.—Cawdor and Garnant Collieries, Ltd. v. Jones (1909), 3 B. W. C. C. 59—C. A.

A workman was permanently injured by the loss of an eye and received compensation under an agreement. The amount of compensation was reduced by another agreement in March, 1908. The employers subsequently applied for a further reduction. The workman contended that the amount of his incapacity had been finally settled by the agreement of March, 1908.

The county court judge held that the man was able to work as a miner, and reduced the compensation to 1*d.* a week.

HELD—that there was evidence on which the judge could come to such a decision, and that the workman's contention that his condition of *res judicata*, and that no change of circumstances had taken place, was bad.

Notes.—*Sharman v. Holliday and Greenwood* [2769]; *Mead v. Lockhart* [2772], applied.

2775.—Thranmere Bay Development Co., Ltd. v. Brennan (1909), 2 B. W. C. C. 403—C. A.

It is not essential to prove a change of circumstances since the previous application to review. Thus, where an application is made by an employer to review a registered agreement upon the ground that the injured workman is partly or entirely fit for work at the date of the application, the arbitrator must hear such application on its merits.

Notes.—*Sharman v. Holliday and Greenwood* [2769] followed.

2776.—Taff Vale Railway Co. v. Lane (No. 2) (1910), 3 B. W. C. C. 297—C. A.

A workman was in receipt of 17s. 5d. a week compensation. His employers then gave him light work at Cardiff, some miles from his home, and filed an application to review. The county court judge reduced the payments to 13s. a week; in arriving at this figure he allowed the man 4s. 6d. for a week-end ticket and lodging allowance, as he had to live apart from his family during the week. The family then came to live in Cardiff, and the employers filed a further application to reduce on the ground of this change of circumstances. The judge then reduced the payments by a further 2s.

HELD—the decision was on a question of fact, and the court would not interfere.

See also *Bryson v. Dunn and Stephen* [2697]; *Clark v. Gas Light and Coke Co.* [2712].

III. *Reduction of Payments to Nominal Sum.*

2777.—Taylor v. London and North Western Railway Co., [1912] A. C. 242; 81 L. J. K. B. 541; 106 L. T. 354; 28 T. L. R. 290; 56 S. J. 323; 5 B. W. C. C. 218; [1912] W. C. Rep. 95—H. L.

Although a county court judge has no jurisdiction to make an order terminating an agreement to pay a workman compensation under the Workmen's Compensation Act, 1906, where the workman's incapacity has ceased, he has jurisdiction to order that the weekly payments of compensation shall finally cease.

The county court judge may also make a suspensory order, either by ordering that the weekly payment shall be ended until further order or by reducing the weekly payment to a nominal amount.

Per Lord Atkinson: An agreement whereby the employer agrees to pay the workman a given sum per week as compensation, to continue until the same shall be ended, diminished, increased, or redeemed in pursuance of the Act and the workman agrees to accept such payment in full discharge of the liability of the employer to pay compensation under the Act, is in accordance with the terms of the Act.

Notes.—*Nicholson v. Piper* (No. 1) [2798] discussed. See also *Weir v. North British Railway Co.* [2780].

2778.—Dempsey v. Caldwell & Co., [1913] W. C. & I. Rep. 738 ; (1913) S. L. T. 267—Ct. of Sess.

A workman was severely injured by the mutilation of three fingers, and the arbitrator found that the injury was permanent. The employers paid compensation but subsequently applied for the termination of the right to compensation on the ground that the incapacity had ceased. The arbitrator found that the workman was no longer incapacitated from earning his former wages and made an order terminating his right to compensation.

HELD—that the case should be remitted to the arbitrator to reconsider his opinion, having in view the fact, as he himself had found, that permanent injury had been suffered by the workman, and to consider whether or no, in view of that finding, he should pronounce a suspensory order, or repeat the finding that he had already given.

Notes.—*Per* the Lord President : “ In judging of wage earning capacity or incapacity, physical fitness to work is not of itself decisive, nor are the conditions of the labour market to be taken in isolation. Both must be had in view in judging of the wage-earning capacity of the workman.” *Macdonald or Duris v. Wilsons and Clyde Coal Co., Ltd.* [2770]; *Ball v. Hunt & Sons*, [1912] A. C. 496 [2594], discussed. *Taylor v. London and North Western Railway Co.* [2777] followed, and held to overrule *Rosie v. Mackay* (No. 2) [2781].

2779.—Tynron (Owners) v. Morgan, [1909] 2 K. B. 66 ; 78 L. J. K. B. 857 ; 100 L. T. 641—C. A.

When an employer applies under the Workmen's Compensation Act, 1906, Schedule I., clause (16), for the review of a weekly payment, on the ground that the incapacity of a workman who was ruptured as the result of an accident has ceased by reason of his wearing a truss, it is the duty of the county court judge, in the case of an accident of this kind, in which the incapacity is likely to recur, to make a suspensory award, the proper form of order being to award a nominal sum of a penny a week to the workman.

Notes.—*Singer Manufacturing Co. v. Clelland*, 42 Sc. L. R. 757 ; *sub nom. Clelland v. Singer Manufacturing Co.*, 7 F. 975 [2782], considered and not followed on this point.

See also *Taylor v. London and North Western Railway Co.* [2777], and the note to *Weir v. North British Railway Co.* [2780].

2780.—Weir v. North British Railway Co., [1912] S. C. 1073 ; 49 Sc. L. R. 772 ; 5 B. W. C. C. 595 ; [1912] W. C. Rep. 332—Ct. of Sess.

Decision in *Rosie v. Mackay*, [1910] S. C. 714 [2781], to the effect that it is incompetent to keep open a claim to compensation by means of a nominal award or similar device, doubted, in view of the opinions delivered in the House of Lords in the subsequent English case of *Taylor v. London and North Western Railway*, [1912] A. C. 242 [2777].

Notes.—*Per* Lord Dundas : “ *Rosie's Case* [2781] has not been

formally overruled ; but whether or not it is to be treated as impliedly overruled, we have, at all events, in *Taylor's Case* [2777], opinions pronounced (*obiter*, it may be) by the noble and learned Lords to the effect that a resort to some means of keeping matters open is competent ; and I think with your Lordship, that we ought to respect and give effect to those opinions, whether they are *obiter* or whether they are not."

2781.—*Rosie v. Mackay* (No. 2), [1910] S. C. 714 ; 47 Sc. L. R. 654—
Ct. of Sess.

In an application by an employer for review of a weekly payment of 18s. to a workman who had been ruptured by an accident, the arbitrator, with the consent of parties, remitted to a medical referee, who reported that, while the workman was not incapacitated and was able for his ordinary work, the ruptures probably would in the future prove detrimental to him. No further evidence was given, and the arbitrator reduced the compensation to 9s. per week.

HELD—(1) that there was no evidence of incapacity for work, before the arbitrator to justify his award of compensation.

(2) That it was incompetent to give a nominal award for the purpose of keeping open the claim for compensation.

(3) That the compensation should be ended (Lord Low and Lord Skerrington, *diss.*). Observations on the competency of evidence to show that the wage-earning capacity of the workman was diminished, notwithstanding his ability to perform his ordinary work.

Notes.—*Clelland v. Singer Manufacturing Co.* [2782] followed. *Tynron (Owners) v. Morgan* [2779] disapproved. *Nicholson v. Piper* [2798] commented on. The decision in this case is overruled by *Taylor v. London and North Western Railway Co.* [2777]. See the notes to *Weir v. North British Railway Co.* [2780] and *Dempsey v. Caldwell* [2779].

2782.—*Clelland v. Singer Manufacturing Co.* (1905), 7 F. 975, *sub nom. Singer Manufacturing Co. v. Clelland*, 42 Sc. L. R. 57—
Ct. of Sess.

In an application by an employer to have a weekly payment to an injured workman reviewed and ended :

HELD—that it is incompetent for the arbitrator, if either party objects, to postpone the determination of the question of compensation by making an *interim* nominal award of 1d. per week.

Semble, that while the Act requires an arbitrator in fixing the amount of a weekly payment to have regard to the average weekly earnings of the workman before the accident, and to the average amount he is earning after the accident, the latter is not conclusive as to the workman's wage-earning capacity.

Notes.—The decision in this case was followed in *Rosie v. Mackay* (No. 2) [2781], and can no longer be considered good law, in so far as it conflicts with the decision in *Taylor v. London and North Western Railway Co.* [2777]. See the notes to *Weir v. North British Railway Co.* [2780] and to *Rosie v. Mackay* (No. 2) [2781]. *Freeland v*

Macfarlane, Lang & Co. [2702]; *Ferrier v. Gourlay* [2756], discussed. *Irons v. Davis and Timmins, Ltd.* [2701]; *Chandler v. Smith*, [1899] 2 Q. B. 506 [2139], referred to.

2783.—*Griga v. S.S. Harelda (Owners)* (1910), 26 T. L. R. 272; 2 B. W. C. C. 116—C. A.

While at work on board a vessel the applicant fell and ruptured himself. He was laid up for a short time and then returned to work. Later, he was medically examined, and the result of that examination was that he was found to be ruptured, but was fit for work if he wore a proper truss and took proper precautions. On an application for compensation under the Workmen's Compensation Act, 1906, the county court judge refused to award any compensation or to make a suspensory order so as to keep the employers' liability alive.

HELD—that a suspensory award of 1*d.* a week should have been made so as to preserve the right of the applicant in the event of future trouble arising as the result of his injury.

Notes.—*Tynron (Owners) v. Morgan* [2779] followed.

2784.—*Green v. Cammell, Laird & Co.* (1913), 29 T. L. R. 703; 6 B. W. C. C. 735; [1913] W. C. & I. Rep. 707—C. A.

Either on an original application for compensation or on an application to review it is equally competent for the court to make a suspensory award of 1*d.* a week in favour of the applicant. On an original application for compensation the county court judge declined to make a suspensory award in favour of the applicant, and made an award in favour of the employers. Subsequently the applicant began further proceedings for compensation in respect of the same accident. The county court judge decided that the matter was *res judicata*, and dismissed the application.

HELD—that the county court judge was right in so holding.

Notes.—*Per Cozens-Hardy, M.R.* : “It seems to me that whether under an original application or under an application to review it is equally competent to the court to make an award of a 1*d.* a week. The case of *Griga v. S.S. Harelda (Owners)* [2783] is a clear authority in this court on the point.” *Nicholson v. Piper* [2798] followed.

IV. *Termination of Payments.*

2785.—*Husband v. Campbell* (1903), 5 F. 1146; 40 Sc. L. R. 822—Ct. of Sess.

A lad of seventeen, who had been temporarily incapacitated by the loss of the third finger of his left hand in consequence of an injury sustained in his employer's factory, received from his employers for a number of weeks, 8*s.* weekly, that being the full sum he would have earned had he been working. The employers then offered to receive him back, and as he did not return ceased making the payments. He then took work from a new employer, and thereafter claimed compensation under the Act from his former employers, in

which proceedings he admitted he was then able to do all his old work.

HELD—that the applicant was not entitled to such a declaration of the liability of his former employers as would preserve his rights in the event of supervening incapacity.

2786.—**Hargreave v. Haughhead Coal Co., Ltd.**, [1912] A. C. 319; 81 L. J. P. C. 167; 106 L. T. 468; 56 S. J. 379; 49 Sc. L. R. 474; 5 B. W. C. C. 445; [1912] W. C. Rep. 275—H. L. (Sc.).

An accident to a miner resulted in the loss of his right eye. He recovered, and his employers applied for the termination of the weekly payments which during his total incapacity they had made him under the Act. It was proved that the man could, as a miner, earn the same wages as before the accident, but that he was suffering from an incipient cataract in his left eye, which, however, was not attributable to the accident, and it was said that in view of the chances of supervening incapacity the arbiter, although the immediate effects of the accident were spent, ought not to make an award finally ending the employers' liability.

HELD—that because the accident made the cataract more serious, that fact did not give a ground for keeping the arbitration alive on the chance of supervening incapacity.

Notes.—*Per* Lord Atkinson: "If the argument of the appellant were well founded, then if a man loses one eye, inasmuch as if anything happens to the other eye, he would become totally blind, the award must be for ever kept open in order to see whether that misfortune will ever befall him. If that were so, there would be no finality in such a case."

2787.—**Braithwaite and Kirk v. Cox** (1911), 5 B. W. C. C. 77—C. A.

A workman lost the sight of one eye by accident. After recovery he was offered his old work, which he refused, as he did not wish to run the risk of losing the other eye. On application by the employers to terminate, the county court judge found that the only future incapacity that might arise from the accident was a possible loss of the other eye from suppuration from the eye, and that this could be avoided by the dead eye being removed by operation. He terminated the payments.

HELD—that there was no evidence on which he could terminate the payments, and that the workman was entitled to a declaration of liability.

Notes.—*Birmingham Cabinet Manufacturing Co. v. Dudley*, 102 L. T. 619 [2717], referred to.

2788.—**Cranfield v. Ansell** (1910), 4 B. W. C. C. 57—C. A.

Upon a joint application, in accordance with paragraph (15) of Schedule II., for a reference to a medical referee, the referee certified that the man was fit for work. The workman subsequently filed an

application for arbitration, at the hearing of which the judge, on the medical evidence, terminated the employer's liability.

HELD—that the judge could make such an order, and was not bound to make a nominal award.

2789.—Edmondsons, Ltd. v. Parker (1911), 5 B. W. C. C. 70—C. A.

On an application to review, it appeared from the evidence that the workman had completely recovered, and that there was no likelihood of a recurrence of incapacity, although the man's finger was still slightly bent as a result of the injury. The county court judge terminated the weekly payments.

HELD—that there was evidence to justify the termination.

2790.—Parry v. Rhymney Iron and Coal Co., Ltd. (1912), 5 B. W. C. C. 632 ; [1912] W. C. & I. Rep. 331—C. A.

An injured workman was given light work and part compensation. The compensation was stopped, and he was offered his old work. He brought proceedings for part compensation. The medical referee reported that he was probably able, at the date when compensation was stopped, to do his old work. The county court judge therefore gave no compensation, but made a declaration of liability.

HELD—there was evidence to support the order.

2791.—Jones v. Tirdonkin Colliery Co. (1911), 5 B. W. C. C. 3—C. A.

An injured collier, after receiving compensation for some time, returned to full work. He suffered from flat-foot, which, he claimed, was due to the accident. The employers applied for termination of the weekly payments, and tendered evidence that the workman was fit for full work. The workman tendered evidence that flat-foot was a disability to a collier. The county court judge terminated the payments without giving any grounds for his decision.

HELD—there was evidence to support the decision.

HELD FURTHER—that in all cases under the Workmen's Compensation Act, 1906, where a county court judge acts as a judge of fact, he should state the grounds upon which he arrives at his finding of fact.

2792.—Reyners, Ltd. v. Makin (1911), 4 B. W. C. C. 267—C. A.

The county court judge, on evidence that the workman had completely recovered, terminated the weekly payments.

HELD—that there was evidence on which he could do so.

2793.—Westcott and Lawrence Lines, Ltd. v. Price (1912), 5 B. W. C. C. 430 ; [1912] W. C. Rep. 280—C. A.

A workman who had been receiving compensation under an award became able to do light work, when the compensation was reduced. The employers subsequently applied to terminate. It

appeared from the medical evidence that the workman had entirely recovered from the effects of the injury though he was prevented from working by the effects of tubercular disease which could in no way be connected with the accident. The county court judge, sitting with a medical assessor, terminated the liability.

HELD (upon the evidence)—that the judge was justified in terminating the liability.

2794.—Emmerson v. Donkin & Co. (1910), 4 B. W. C. C. 74—C. A.

The question whether or not the workman is entitled to an award of a penny a week to keep alive his right to apply for a further review in the event of prospective loss is one of fact for the arbitrator to decide.

2795.—Wheeler, Ridley & Co. v. Dawson (1912), 107 L. T. 339 ; 5 B. W. C. C. 645 ; [1912] W. C. Rep. 410—C. A.

Where a county court judge, sitting as arbitrator under the Workmen's Compensation Act, 1906, has found—there being ample evidence to justify his finding—that a workman who has been injured by accident and has been awarded compensation in respect thereof is no longer suffering from any incapacity resulting from the accident, that is a finding of fact with which the Court of Appeal has no jurisdiction to interfere ; and the judge has power to make an order ending the liability of the employers to make any further weekly payments under the original award, and is not bound to qualify his finding of fact by deciding that he ought to make a suspensory award.

2796.—Simpson v. Byrne (1913), 47 Ir. L. T. 27 ; 6 B. W. C. C. 455 ; [1913] W. C. & I. Rep. 240—C. A. (Ir.).

Where at the hearing on November 19th, 1912, of an application to review and terminate the weekly payments, payable under a recorded agreement, to a girl employed as a farm labourer who had broken her arm on September 6th, 1911, and had been receiving 10s. a week since the time of the accident, evidence was given by one doctor that, on examination before the hearing, he found the arm quite well save for a wasting of muscles due to want of exercise, and that this would at any time be remedied by exercising the arm ; whereas the doctor who examined on behalf of the girl expressed the opinion that she was still incapacitated from farm work :

HELD—that there was evidence to support a finding by the county court judge that the girl's arm was quite recovered and that the county court judge was right in terminating the payment and in refusing to make a suspensory award.

Notes.—*Wheeler, Ridley & Co. v. Dawson* [2795] followed.

2797.—Howards v. Wharton (1913), 6 B. W. C. C. 614 ; [1913] W. C. & I. Rep. 504—C. A.

A workman met with an accident by which he lost the sight of his eye, which had to be removed. After recovery from the operation,

his employers offered him light work at approximately his old wages. He abandoned this work, after trying it for a week, saying that he was afraid of losing the sight of the other eye. Upon an application by the employers the judge terminated the weekly payments and made a declaration of liability.

HELD—that he was justified in so doing.

Notes.—The court accepted the decision of the county court judge who relied upon *Eyre v. Houghton Main Colliery Co.* [2722] and *Cox v. Braithwaite and Kirk* [2768].

2798.—*Nicholson v. Piper* (No. 1), [1907] A. C. 215; 76 L. J. K. B. 856; 97 L. T. 119; 23 T. L. R. 620; 51 S. J. 569—H. L. (E.).

A workman injured by an accident signed an agreement, which was duly recorded in the county court, by which he was to receive a weekly payment during incapacity, “or until the same should be ended, diminished, increased, or redeemed in pursuance of the said Act.” On an application to review made by the employer, the arbitrator made an award that the weekly payments should be ended. The workman did not appeal. The workman, on a recrudescence of his injury, made an application for a review and increase of the weekly payment.

HELD—that the award on the first application for review was final, and no second application for review could be entertained.

Quære, as to the legal effect of making a nominal award in order to keep the applicant’s rights alive.

2799.—*Cadenhead v. Ailsa Shipbuilding Co., Ltd.*, [1910] S. C. 1129; 47 Sc. L. R. 784—Ct. of Sess.

Where the sheriff has already found that a workman’s incapacity has ceased, and has terminated the weekly payments, an application by the workman for compensation on the ground of supervening incapacity, caused through the injury sustained by him, is incompetent.

V. *Review under unrecorded Agreements.*

2800.—*Southhook Fire-Clay Co. v. Laughland*, [1908] S. C. 831; 45 Sc. L. R. 664; 1 B. W. C. C. 405—Ct. of Sess.

Employers who were paying compensation to a workman under an unrecorded verbal agreement applied on December 21st, 1907, under the Workmen’s Compensation Act, 1906, Schedule I., s. 16, to have the payments reviewed, and the compensation ended as at November 1st, 1907, on the ground that incapacity had then ceased. The arbitrator found that the workman’s incapacity ceased on November 1st, 1907, and on January 29th, 1908, issued his award ending the payments as from that date.

HELD—that as there was no recorded agreement, the compensation should be ended as from the date when incapacity ceased, and not from the date of the application for review or from the date of the arbitrator’s award.

Notes.—*Steel v. Oakbank Oil Co.* [2811]; *Pumpherson Oil Co., Ltd. v. Cavaney* [2812], distinguished and commented on. *Morton v. Woodward* [2803] referred to. The Lord President, after discussing the effect of the above cases, said: "Where the payments that had been made were made under something which is equivalent to a judgment—that is to say, in respect of a recorded memorandum—is one state of affairs. But where there was no compulsory warrant for the payment is another state of affairs. I do not propose to go into the arguments that were used in these cases; and, in particular, I reserve my own personal opinion as to whether I agree with the judges of the majority here or with the judges of the minority here who agreed with the judges of the English court. But I say this, that it is perfectly evident that the whole of the reasoning of the majority here, who decided that the date must be the third of the dates I have specified, depended upon the fact that there was an operative judgment ordaining a certain sum to be paid weekly to the workman, and that until that judgment was got rid of, it must continue to have effect. When we come to the facts of this case it is otherwise. Here no memorandum of agreement was ever recorded. All that happened was that there was a *de facto* payment from 2nd July, 1907, down to 1st November, 1907; that on 1st November, 1907, the employers ceased payment; and then, as the workman would not admit that he had no claim to compensation, the employers presented a petition to the sheriff to bring the payments to an end. On that petition the sheriff-substitute has found, as a matter of fact, that on 1st November, 1907, the workman was completely recovered, and that he had recovered was evidenced by the fact that at that moment he was in full employment with a wage actually higher than he had earned before. In other words, the sheriff-substitute has found that *de facto* the ceasing payment was perfectly right."

2801.—*Nelson v. Summerlee Iron Co.*, [1910] S. C. 360; 47 Sc. L. R. 344—Ct. of Sess.

A workman was injured on July 31st, 1908, and his employers paid him compensation until April 1st, 1909, when they ceased further payments. Thereafter, on May 17th, 1909, they applied for a declaration that the workman's right to compensation had ceased on April 1st, or alternatively, for an award of partial compensation.

HELD—that the application was competent, although no compensation was actually being paid and no memorandum of agreement had been recorded.

Notes.—*Southhook Fire-Clay Co. v. Laughland* [2800] followed. Dictum in *Lochgelly Iron and Coal Co. v. Sinclair* (No. 3), [1909] S. C., at p. 931 [2948], commented on.

2802.—*Bradbury v. Bedworth Coal and Iron Co.* (1900), *Times*, March 17th; 2 W. C. C. 238—C. A.

A review of weekly payments by the parties themselves may take place. Such a review and an agreement may be implied.

Compensation was paid from August 22nd to September 23rd, when the man returned to work at full wages. This he continued to do until November 16th, when he was discharged because the pit was closed. For the next three months he applied for work, but there was none for him to do.

HELD—that there was evidence that on September 23rd the weekly payment was reviewed and ended by mutual consent.

Notes.—A contrary view was taken by the Court of Appeal in Ireland in *O'Callaghan v. Martin* (1904), 38 Ir. L. T. 152 [2222]. See also and compare *Williams v. Vauxhall Colliery Co.*, [1907] 2 K. B. 433 [2583].

VI. *Time from which Payments may be ended, diminished, or increased.*

2803.—*Morton & Co., Ltd. v. Woodward*, [1902] 2 K. B. 276; 71 L. J. K. B. 736; 86 L. T. 878; 51 W. R. 54; 66 J. P. 660 C. A.

In an application under s. 12 of the First Schedule of the Workmen's Compensation Act, 1897, to review weekly payments made to an injured workman during incapacity, the arbitrator is not bound to regard solely the state of the workman's capacity at the date of the hearing of the application, but has jurisdiction and is bound to inquire into the workman's condition at the date when the application is filed, and *semble* also during the period between the filing and the hearing of the application.

2804.—*Upper Forest and Western Steel and Tinplate Co. v. Thomas*, [1909] 2 K. B. 631; 78 L. J. K. B. 1113—C. A.

On a simple application by the employers under clause 12 of Schedule I. to the Workmen's Compensation Act, 1897, seeking to terminate or diminish a weekly payment on the ground that the workman has completely recovered or is capable of doing light employment, the county court judge has no jurisdiction to make an award that the incapacity ceased at a date prior to the notice of the application to review.

Notes.—*Morton & Co., Ltd. v. Woodward* [2803] followed. Cozens-Hardy, M.R., in judgment said: "It is really unnecessary for the court to consider whether, if the matter had been referred to the arbitrator, it would have been competent to him to decide that the incapacity had ceased at a previous date. I desire to leave that an open question, and I must not be taken as indicating a view one way or the other upon the point. That was not the question referred to the arbitrator on this application."

2805.—*Charing Cross, Euston and Hampstead Railway v. Boots*, [1909] 2 K. B. 640; 78 L. J. K. B. 1115; 101 L. T. 53; 25 T. L. R. 683—C. A.

On a simple application by the employers under clause 16 of Schedule I. to the Workmen's Compensation Act, 1906, seeking to terminate a weekly payment on the ground that the workman's

incapacity has ceased, the county court judge has no jurisdiction to make an award that the incapacity ceased at a date antecedent to the date of the application. *Secus*, if there is a formulated dispute as to the workman's incapacity at a particular date—*per* Cozens-Hardy, M.R., and Kennedy, L.J.

The county court judge has jurisdiction on such an application to go back to an earlier date where from the first the only question between the parties was whether the incapacity had ceased and when it had ceased—*per* Buckley, L.J.

Notes.—The judgments in this case are of great importance, and should be referred to on the question as to the time from which payments may be ended. In his judgment Cozens-Hardy, M.R., said: "When an application to review is made under paragraph (16) of the First Schedule, there has been a serious difference of opinion between this court and the Court of Session as to the date from which review can be granted. This court in *Morton & Co., Ltd. v. Woodward* [2803], held that it is competent to the arbitrator to terminate a payment from a date antecedent to the date on which his award is made. In that case the only relevant date was the date of the application. That case was followed in the recent case of *Upper Forest and Western Steel and Tinplate Co. v. Thomas*, [1909] 2 K. B. 631 [2804], in April last, and possibly extended in so far as it held that it is not competent to an arbitrator, on a simple application to terminate payment on the ground that incapacity has ceased, to make an order terminating liability from an antecedent date. I was a party to both those decisions. They are binding upon this court in so far as they do not depend upon particular circumstances, and in my opinion they do decide that on a simple application such as we have here, and such as there was in the case of *Thomas*, the arbitrator cannot go outside of the submission, the submission being simply this: 'Was the workman at the date of the application incapacitated?' In the case of *Thomas*, I expressly abstained from deciding whether, if the application to review asks a declaration from a definite antecedent date, the same principle would apply, but I intimated the opinion, to which I still adhere, that if there is a formulated dispute as to a workman's incapacity at a particular date, it is competent to the arbitrator to decide that dispute."

2806.—*Baker v. Jewell*, [1910] 2 K. B. 673; 79 L. J. K. B. 1092; 103 L. T. 173—C. A.

It is not competent for a county court judge acting as arbitrator under the Workmen's Compensation Act, 1906, to make a prospective award of so much a week for a certain time, and after that time a smaller sum. An arbitrator has only jurisdiction to award payments during the incapacity of the workman, and his duty is to ascertain what is the workman's earning capacity at the date of the application and award accordingly, leaving it to the employer to apply for a reduction in the event of the workman's recovery. A prospective award is also wrong inasmuch as it shifts the *onus* of proof from the employer to the workman in a way that may be unfair to the workman.

Notes.—*Allan v. Thomas Spowart & Co., Ltd.* [2807], approved.

2807.—Allan v. Thomas Spowart & Co., Ltd. (1906), 8 F. 811 ; 43 Sc. L. R. 599—Ct. of Sess.

In an application to have compensation, payable to an injured workman, ended or diminished the arbitrator made a remit to a medical referee, who on February 26th, 1906, reported that the workman's wage-earning capacity would be fully restored by March 31st. The arbitrator on February 27th ordered compensation to be continued till March 31st and to end at that date.

HELD—that the arbitrator had no power to make such an order in respect that his duty in assessing compensation was to have regard to the workman's present state, and that he was not entitled to pronounce an order the validity of which would depend on the workman's condition at a future date.

2808.—Hull, Ltd. v. Brady (1913), 47 Ir. L. T. 211 ; [1913] W. C. & I. Rep. 706—C. A. (Ir.)

On an application to review, the Recorder of Belfast found that the workman would be fit for work in a month, and made an award that on the undertaking of the employers to give him light work for a month at the old rate of wages, the compensation should cease from the date of the order.

HELD—that the Recorder must determine whether the man had quite recovered or whether he was still partly incapacitated, and if the latter that he should award such compensation as was provided by the Act.

2809.—Newhouse & Co. v. Johnson (1911), 5 B. W. C. C. 137—C. A.

On an application to review, the county court judge awarded to a partially incapacitated workman 10s. per week, or two-thirds of the difference between £1 and his actual earnings, whichever sum should be the less.

HELD—that there was no jurisdiction to make such an award.

Notes.—*Baker v. Jewell* [2806] applied.

2810.—Donaldson v. Cowan, [1909] S. C. 1292 ; 46 Sc. L. R. 920 ; 2 B. W. C. C. 390—Ct. of Sess.

Upon an application for the review of a weekly payment under the Workmen's Compensation Act, 1906, on the ground that the workman's incapacity has ceased, it is competent for the arbitrator, if he finds that the incapacity has ceased at or prior to the date of the application, to terminate the weekly payment as from the date of the application, and he is not bound to treat the payment as enforceable up to the date of his decision ; but it is not competent for him to terminate the payment as from any date prior to that of the application.

Notes.—Opinions of the Lord President and Lord Salvesen in *Lochgelly Iron and Coal Co. v. Sinclair* (No. 3) [2948] and the decision in *Morton & Co., Ltd. v. Woodward* [2803] approved. *Steel v. Oakbank*

Oil Co. [2811] and *Pumpherstons Oil Co. v. Cavaney* [2812] overruled. *Charing Cross, Euston and Hampstead Railway v. Boots* [2805]; *Upper Forest Tinplate Co. v. Thomas* [2804], referred to.

2811.—Steel v. Oakbank Oil Co. (1903), 5 F. 244; 40 Sc. L. R. 204—Ct. of Sess.

When an application under Schedule I., paragraph (12) of the Workmen's Compensation Act, 1897, to review a weekly payment under the Act, is brought before an arbitrator, he is bound to treat the agreement for, or award of, the weekly payment, as enforceable up to the date of his decision in the application, and can end, diminish, or increase the payment as from that date only (the Lord Justice Clerk *diss.*). *Morton & Co., Ltd. v. Woodward* [2803] disapproved.

Notes.—This case is overruled by *Donaldson v. Cowan* [2810].

2812.—Pumpherstons Oil Co. v. Cavaney (1903), 5 F. 963; 40 Sc. L. R. 724—Ct. of Sess.

On an application under Schedule I., paragraph (12) of the Act to review a weekly payment, the arbitrator is bound to treat the agreement for, or award of, the weekly payment as enforceable up to the date of his decision (Lord M'Laren *diss.*).

Notes.—This case is overruled by *Donaldson v. Cowan* [2810]. *Steel v. Oakbank Oil Co.* [2811] approved. *Morton & Co., Ltd. v. Woodward* [2803] disapproved.

2813.—Baird v. Stevenson, [1907] S. C. 1259; 44 Sc. L. R. 864—Ct. of Sess.

In an application under paragraph (12) of the First Schedule to the Workmen's Compensation Act, 1897, to review a weekly payment under the Act, the arbitrator has power to end, diminish, or increase the payments only as from the date of his decision in the application.

Notes.—This case is no longer good law on this point, since the decisions in *Steel v. Oakbank Oil Co.* [2811] and *Pumpherstons Oil Co. v. Cavaney* [2812], which were followed, were overruled by *Donaldson v. Cowan* [2810]. This case also decided a point as to the rectification of the register (see [2952]).

VII. *Weekly Sum which the Workman would probably have been Earning.*

2814.—Vickers, Sons and Maxim, Ltd. v. Evans, [1910] A. C. 444; 79 L. J. K. B. 954; 103 L. T. 292; 26 T. L. R. 548; 54 S. J. 651; 3 B. W. C. C. 403—H. L.

In July, 1907, the applicant, being then under twenty-one years of age, was engaged by the respondents as a labourer at 22s. per week. Prior to this he was a stove-grate fitter, and he only went to the respondents as a labourer because he was short of work in his own trade. While in the respondents' service he met with an accident

to his right arm, and in respect thereof compensation was made to him at 11s. 4d. per week. In February, 1909, he had so far recovered that he was able to do light work found for him by the respondents at the same rate of wages as he had received before the accident. The compensation was thereupon reduced to a penny per week. In August, 1909, the applicant, being then twenty-one, applied for a review of the award, and claimed that he would have been earning more than the old rate of wages had it not been for the accident. Upon that application the county court judge came to the conclusion that the proviso to clause (16) to Schedule I. to the Workmen's Compensation Act, 1906, applied, and he decided in favour of the applicant that he would be able to earn as a stove-grate fitter 30s. a week; he accordingly made an award that the penny per week be increased to 7s. 6d. per week until further review.

HELD—that the words “the weekly sum which the workman would probably have been earning” in the proviso to clause (16) of Schedule I. to the Workmen's Compensation Act, 1906, are not limited to what the workman would probably have been earning in the employment of the same employer, and that the county court judge had come to a right conclusion.

Notes.—*Per* Lord Macnaghten : “Within a fixed limit the statute leaves the question quite at large, trusting to the discretion and good sense of the county court judge. No doubt the task committed to him is somewhat difficult, but the judge has been trusted, and I think properly trusted, to deal with each case reasonably without any fear of his making an extravagant or immoderate estimate of the workman's earning capacity.”

2815.—**Ambridge v. Good** (1912), 5 B. W. C. C. 691; [1912] W. C. Rep. 374—C. A.

A girl aged sixteen earning 6s. a week was injured by accident, and received 6s. a week compensation. On a review when the girl was just under nineteen, the county court judge found that the girl would now have been earning 10s. a week had she not been injured. He refused to increase the compensation on the ground that under the proviso to Schedule I., paragraph (16), of the Workmen's Compensation Act, 1906, he could only award her 50 per cent. of what she would be earning, *i.e.*, 5s. a week.

HELD—that this decision was right.

2816.—**Edwards v. Alyn Steel Tinsplate Co., Ltd.** (1910), 3 B. W. C. C. 141—C. A.

The maximum amount of compensation fixed by Schedule I., paragraph (3) of the Workmen's Compensation Act, 1906, which is referred to in Schedule I., paragraph (16), is subject to the proviso in the latter paragraph. So that where a workman who is a minor has been injured and has returned to work at the same wages as before the accident, it is competent for the judge or arbiter on an application to review an award under Schedule I., paragraph (16), to award a

weekly sum not exceeding 50 per cent. of the probable earnings of the workman if he had not been injured.

2817.—*Malcolm v. Bowhill Coal Co.* (No. 2), [1910] S. C. 447 ; 47 Sc. L. R. 449 ; 3 B. W. C. C. 562—Ct. of Sess.

A minor workman was injured and received compensation till April 13th, 1908, when he returned to work, and thereafter the employers applied for an order finding that the workman's incapacity had ceased at April 13th, 1908, and declaring the compensation at an end. After sundry proceedings which delayed the decision till more than twelve months after the accident, the arbitrator found that the workman had not completely recovered from the effects of the injury (which was rupture), and refused the employers' application. He stated a case, in which he found in fact that after April 13th, 1908, the workman had earned "much the same wages as before the accident"; and the question for the determination of the court was whether the fact that the workman earned the same wages after as before the accident in itself entitled the employers to have the compensation declared at an end. The court, without answering the question, remitted to the arbitrator to determine whether the workman's earning capacity was the same as, or less than, it would have been had he not been injured.

Opinion, *per* Lord Kinneir : The fact that a workman is earning the same wages as before the accident may not in itself be conclusive as to the termination of his right to compensation.

Opinion, *per* Lord Johnston : If the workman had not been a minor, that fact would have been conclusive.

Notes.—*Clelland v. Singer Manufacturing Co.*, 7 F. 975 [2782], referred to. *Owners of SS. Tynron v. Morgan*, [1909] 2 K. B. 66 [2779], disapproved. Lord Johnstone, in referring to the difficulty of construing Schedule I., paragraph (3) and Schedule I., paragraph (16) together, consistently with giving each its literal effect, said : "It is more than probable that when s. 3 was drafted s. 16 was not in contemplation . . . To complete the idea of the legislature it would be necessary to read s. 3 as meaning by implication, that the weekly payment shall in no case exceed the difference between the average weekly earnings of the workman, actual before the accident, or constructively increased after the accident in accordance with s. 16, and the average weekly amount which he is earning or is able to earn after the accident. While I think that this is a wide stretch of construction, I think the intention of the legislature is sufficiently clear to make it legitimate."

See also *Malcolm v. Thomas Spowart, Ltd.* (1913), 50 Sc. L. R. 823 [2706].

VIII. *Onus of Proof.*

2818.—*M'Callum v. Quinn*, [1909] S. C. 227 ; 46 Sc. L. R. 141 ; 2 B. W. C. C. 339—Ct. of Sess.

In an application under the Workmen's Compensation Act, 1906, for review of a weekly payment fixed by a registered memorandum

of agreement, the arbitrator found that the workman was unable to work in consequence of a cardiac affection which was not proved to be in any way connected with the injuries in respect of which compensation was payable, and that it was not proved that the workman still suffered from these injuries in such a way as to render him incapable of work.

HELD—that upon such findings the employer was not entitled to have the weekly payments ended, the *onus* being upon him, in the case of a weekly payment fixed by a registered memorandum of agreement, to prove affirmatively that the workman had recovered from his injuries.

2819.—**Walton v. South Kirby, Featherstone and Hemsworth Colliery, Ltd.** (1912), 107 L. T. 337; 5 B. W. C. C. 640; [1912] W. C. Rep. 383—C. A.

It is not competent for a county court judge, sitting as arbitrator under the Workmen's Compensation Act, 1906, to prophesy as to how long the incapacity for work of an injured workman will last, and to anticipate what may happen in the future in the workman's condition. It is for the employer who desires to obtain on the ground of change of circumstances a review of the weekly payment which has been made payable to the injured workman to establish that such change has taken place, and the *onus* of so proving ought not to be shifted to the workman.

Notes.—*Baker v. Jewell* [2806] applied. *Proctor v. Robinson*, [1911] 1 K. B. 1004 [2728]; *Cardiff Corporation v. Hall*, [1911] 1 K. B. 1009 [2729], distinguished.

2820.—**Darroll v. Glasgow Iron and Steel Co., Ltd.**, [1913] S. C. 387; 50 Sc. L. R. 226; 6 B. W. C. C. 354; [1913] W. C. & I Rep. 80—Ct. of Sess.

In an application under the Workmen's Compensation Act, 1906, for review of a weekly payment made to a workman in respect of his incapacity for work which resulted from an attack of nystagmus, the arbiter found that although the workman had "now completely recovered" from the attack, he was liable to a recurrence of the disease, but that the evidence was inconclusive as to whether this liability was due to constitutional predisposition or to the original attack.

HELD (upon these findings)—that the employers were entitled to have the weekly payments ended, because the workman had not discharged the burden of proving that his liability to a recurrence of the disease was due to the original attack.

Notes.—*Per* the Lord Justice Clerk: "The whole matter turns on what is to be proved and who is to prove it. A tendency to a recurrence of evil may be incapacity under the Act, but unless the workman can prove that such tendency is connected with the original evil condition produced by the accident—as in this case by the attack of nystagmus—the employer cannot be called on to pay any further compensation."

M'Ghee v. Summerlee Iron Co., Ltd., [1911] S. C. 870 [2763], and *Jones v. New Brynmally Colliery Co.*, 5 B. W. C. C. 375 [2421], followed. *Duris v. Wilsons and Clyde Coal Co., Ltd.*, [1912] S. C. (H. L.) 74 [2770], distinguished. *M'Callum v. Quinn* [2818]; *Garnant Anthracite Collieries, Ltd. v. Rees*, 5 B. W. C. C. 694 [2422], referred to.

See also *Proctor v. Robinson* [2728]; *Cardiff Corporation v. Hall* [2729]; *Eaves v. Blaenclwydach Colliery Co.* [2613]; *Cory v. Hughes* [2720]; *New Monckton Collieries v. Toone* [2721].

REDEMPTION OF WEEKLY PAYMENTS.

Schedule I., paragraph (17).—Where any weekly payment has been continued for not less than six months, the liability therefor may, on application by or on behalf of the employer, be redeemed by the payment of a lump sum of such an amount as, where the incapacity is permanent, would, if invested in the purchase of an immediate life annuity from the National Debt Commissioners through the Post Office Savings Bank, purchase an annuity for the workman equal to seventy-five per cent. of the annual value of the weekly payment, and as in any other case may be settled by arbitration under this Act, and such lump sum may be ordered by the committee or arbitrator or judge of the county court to be invested or otherwise applied for the benefit of the person entitled thereto: Provided that nothing in this paragraph shall be construed as preventing agreements being made for the redemption of a weekly payment by a lump sum.

The following scheme of arrangement has been adopted in considering the effect of paragraph (17).

Firstly, where incapacity is permanent. If the arbitrator finds that the incapacity is permanent he must award 75 per cent. of the actuarial value of the weekly payment, but he must not have regard to the principles laid down in paragraph (17) unless he is first of all satisfied that the incapacity is permanent (*Swannick v. Trustees of Congested Districts Board* [2822]).

For the incapacity to be permanent it is not necessary for the physical injury to be permanent, the test being “that in all reasonable probability the weekly payments to which the man is entitled will never alter” (*per Fletcher Moulton, L.J., in Calico Printers’ Association, Ltd. v. Higham* [2821]). The incapacity need not be total but may be partial (*Calico Printers’ Association, Ltd. v. Higham*). The decision of the Court of Session in *National Telephone Co., Ltd. v. Smith* [2823] was expressly disapproved by the Court of Appeal in the last-mentioned case (see also *Staveley Coal and Iron Co. v. Elson* [2824]). The arbitrator must award a lump sum, which can be enforced as a judgment, and it is compulsory on the employer to redeem at the figure found payable (*Calico Printers’ Association, Ltd. v. Booth* [2825]). This case also decided that the arbitrator must act on the evidence before him, and may properly exclude his own personal knowledge of the local labour market.

Secondly, where the incapacity is not permanent. If the matter is not settled by agreement it must be determined by arbitration under the Act. In this case the arbitrator has a discretion and “may award a larger amount than the 75 per cent. of the actuarial value of the then existing weekly payment” (*per Fletcher*

Moulton, L.J., in *Calico Printers' Association, Ltd. v. Higham* [2821]), and the employer cannot limit the discretion of the arbitrator by fixing the amount of the lump sum which he is willing to pay (*Castle Spinning Co. v. Atkinson* [2826]). The arbitrator in determining the present value of future weekly payments must take into consideration the probability of the workman's recovery and of his future capacity for work (*Victor Mills, Ltd. v. Shackleton* [2827]; see also *Pattinson v. Stevenson* [2828] and *Grant and Aldcroft v. Conroy* [2829]).

Thirdly, right of employer to make or discontinue application. An application for redemption can only be made by the employer, who has an absolute right to redeem subject to the condition that the weekly payments have been continued for not less than six months (*Kendall and Gent, Ltd. v. Pennington* [2830]). But if the workman agrees to the application being heard within less than the six months it is a consent order from which no appeal will lie (*Howell v. Blackwell* [2852]). It would appear that an employer may discontinue his proceedings for redemption (*Dixon v. Patten* [2831]).

For procedure see Workmen's Compensation Rules, 1913, rr. 65, 72 and 73, and Form 5.

The cases are divided as follows :—

- I. Where Incapacity is Permanent.
- II. Where Incapacity is not Permanent.
- III. Right of Employer to make or discontinue Application.

I. *Where Incapacity is Permanent.*

2821.—*Calico Printers' Association, Ltd. v. Higham*, [1912] 1 K. B. 93; 81 L. J. K. B. 232; 105 L. T. 734; 28 T. L. R. 53; 56 S. J. 89; 5 B. W. C. C. 97; [1912] W. C. Rep. 104—C. A.

On an application by employers under Schedule I., paragraph (17) of the Workmen's Compensation Act, 1906, to redeem a weekly payment, the arbitrator cannot make an order for redemption on the actuarial basis provided by the first part of the paragraph without arriving at the conclusion upon evidence that the workman's incapacity—total or partial—is permanent. If the workman's condition is stable, the incapacity is "permanent" within the meaning of that expression in the paragraph. There is no power to redeem until a weekly payment of constant amount has continued for six months.

Notes.—*National Telephone Co. v. Smith* [2823] disapproved.

Fletcher Moulton, L.J., in his judgment said: "It will be seen, therefore, that in my opinion incapacity is not permanent if there is a practical possibility of the weekly payment being increased or diminished. The actuarial method of calculating the commutation is prescribed only when the facts are such that the weekly payments which constitute the compensation have arrived at a condition of stability. If it were not so, this provision might lead to gross injustice to the workman. For example, nothing is more common than for a workman to be taken back for light work by his employers, and to be paid liberal wages for it, the weekly payment being adjusted according thereto. It would be most unfair if the employer could, after paying such weekly amount for six months, apply for commutation, admitting that the incapacity was permanent, and demand that the sum should be fixed on an actuarial basis. After paying the commuted sum there would be no obligation on the employer to continue to employ the man at the wages previously given; and he might not be worth equally high wages in the labour market. . . . All these considerations strengthen me in the view that the meaning of the phrase 'the incapacity is permanent' is not that the physical injury is permanent, but that in all reasonable probability the weekly payments to which the man is entitled will never alter. And I would point out that it follows from this reasoning that there is no ground for treating the actuarial commutation as fixing a maximum sum for redemption beyond which no award can go. If the case comes under the latter portion of the section, it is open to the arbitrator to award a larger amount than 75 per cent. of the actuarial value of the then existing weekly payment, if he comes to the conclusion that in the future the weekly payment will probably be increased."

The case of *Norman and Burt v. Walder*, [1904] 2 K. B. 27 [2709], was commented on by Fletcher Moulton, L.J., as follows: "The decision in that case is, of course, binding upon me, and I do not wish to express any dissent from it; but at the same time I do not understand it to mean that you can, in all cases, take the actual profits

of a business which an ex-workman has set up as 'earnings' for the purpose of calculating compensation. It would be most unfair so to do as a general rule; and the unfairness might tell against the workman or against the employer according to the circumstances of the case. The workman might be employing capital of his own in the business, the profits of which the employer ought not to be able to appeal to in reduction of compensation for incapacity; and, on the other hand, the business might be unsuccessful, and the profits might inadequately represent the earning power of the workman as a workman. I am inclined to think that the phrase in paragraph (3), 'the average weekly amount which he is earning or is able to earn in some suitable business after the accident,' means in such a case the value of the work which the workman is doing in his own business; that is to say, the wages that he would have to give to a suitable man for performing the services therein which he himself is performing."

The dictum of Farwell, L.J., that "the *onus* of proving permanent incapacity is on the person alleging it" was doubted in *Calico Printers' Association, Ltd. v. Booth* [2825].

2822.—Swannick v. Trustees of Congested Districts Board (1912), 46 Ir. L. T. 253; 6 B. W. C. C. 449; [1913] W. C. & I. Rep. 96—C. A. (Ir.).

In determining the adequacy or inadequacy of a lump sum agreed to be paid in redemption of a weekly payment under the Workmen's Compensation Act, 1906, the county court judge ought not to be guided by the principle laid down in paragraph (17) of the First Schedule of the Act unless he is satisfied that the incapacity of the injured workman is permanent.

2823.—National Telephone Co. v. Smith, [1909] S. C. 1363; 46 Sc. L. R. 988; 2 B. W. C. C. 417—Ct. of Sess.

The employers of a workman who had lost an arm as the result of an accident while in their employment, and who under agreement had received compensation at the rate of 16s. per week for over six months, applied under s. (17) of the First Schedule of the Workmen's Compensation Act, 1906, for redemption of liability. The facts above stated having been admitted by the parties, the arbitrator, without further enquiry, fixed the amount payable by the employers at £622 14s. Sixteen shillings per week was admittedly the maximum rate of compensation for total incapacity. In an appeal, the employers denied that the workman's incapacity was permanent, and asked for an enquiry into his ability to work.

HELD (Lord Low *diss.*)—that the incapacity was permanent in the sense of s. (17) of the First Schedule, and that the arbitrator had rightly proceeded, without further proof, to award a sum determined on that footing.

Notes.—The decision in this case was expressly disapproved in *Calico Printers' Association, Ltd. v. Higham* [2821]. *Clelland v. Singer Manufacturing Co.*, 7 F. 975 [2782], distinguished.

2824.—Staveley Coal and Iron Co. v. Elson (1912), 5 B. W. C. C. 301; [1912] W. C. Rep. 228—C. A.

A workman received an injury which necessitated the amputation of the right forefinger and the removal of part of the metacarpal bone of the hand. He was thereby permanently partially incapacitated. The employers paid compensation, and after six months applied to redeem under Schedule I., paragraph (17). The county court judge, following *National Telephone Co. v. Smith* for redemption on the actuarial basis in the first part of the paragraph, awarded £742 19s. 2d. as a lump sum redemption, but also made an alternative award of £300 if it were held that he was not entitled to follow the above case.

HELD—that the county court judge misdirected himself in following the case of *National Telephone Co. v. Smith* [2823], which had since been dissented from in the case of *Calico Printers' Association, Ltd. v. Higham* [2821], and that the case must go back to decide what was the degree of permanent incapacity which existed in consequence of the accident.

2825.—Calico Printers' Association, Ltd. v. Booth [1913], W. C. & I. Rep. 540; 82 L. J. K. B. 895; 109 L. T. 123; 57 S. J. 662; 29 T. L. R. 664; 6 B. W. C. C. 551, 556—C. A.

Where an employer applies for commutation of a weekly payment under clause (17) of Schedule I. to the Workmen's Compensation Act, 1906, the arbitrator, whether he finds the incapacity to be permanent or not, must award a lump sum which can be enforced as a judgment. When the award has been made it is compulsory on the employer to redeem at the figure found payable, and the award should not be in the form that the employer "may" redeem the weekly payment at that figure.

In an application under clause (17) the arbitrator must ascertain on the evidence before him, as best he can, whether the weekly payment already fixed is likely to be proper during the rest of the workman's life; and so long as he does not misdirect himself his conclusion of fact will not be interfered with; thus he may properly exclude his own personal knowledge of the labour market in the district.

Notes.—*Castle Spinning Co. v. Atkinson* [2826] followed.

Dictum of Farwell, L.J., in *Calico Printers' Association, Ltd. v. Higham* [2821], that the onus of proving permanent incapacity is on the person alleging it, doubted.

II. Where the Incapacity is not Permanent.

N.B.—See *Calico Printers' Association, Ltd. v. Higham* [2821].

2826.—Castle Spinning Co. v. Atkinson, [1905] 1 K. B. 336; 74 L. J. K. B. 265; 92 L. T. 147; 53 W. R. 360; 21 T. L. R. 192—C. A.

An arbitrator has no jurisdiction under clause (13) of the First Schedule to the Workmen's Compensation Act, 1897, to entertain

an application by an employer for redemption of his liability for weekly payments under the Act by payment of a lump sum where by the application the employer limits the amount of the lump sum which he is willing to pay.

2827.—Victor Mills, Ltd. v. Shackleton, [1912] 1 K. B. 22; 81 L. J. K. B. 34; 105 L. T. 613; 5 B. W. C. C. 30; [1912] W. C. Rep. 33—C. A.

In computing the lump sum that may be ordered to be paid by an employer, pursuant to s. (13) of the First Schedule to the Workmen's Compensation Act, 1897, in redemption of the liability for a weekly payment that has been continued to a workman for not less than six months, the county court judge, if he frankly and openly bases his award on a wrong method, has not a free hand in the matter, but he must proceed on a correct principle, taking into consideration, in determining the present value of future weekly payments, the probability of the workman's recovery and of his future capacity for work either wholly or partially, likewise his age and state of his health, so that his expectation in life may be ascertained.

On an application by the employers to redeem a weekly payment of 16s. 1d. which a workman was receiving under the Workmen's Compensation Act, 1897, the county court judge assessed the sum which he thought would have been awarded to the workman by a jury for such an injury at the time of the accident at £300. He then deducted from that sum the £179 6s. 7d. which the workman had already received in weekly payments, leaving a balance of £120 13s. 5d. which he awarded as the lump sum to be paid by the employers in redemption.

HELD—that this method of computation was wrong and the case must be sent back.

2828.—Pattinson v. Stevenson (1900), 109 L. T. J. 106; 2 W. C. C. 156—C. A.

HELD (by his Honour Judge Stonor)—that the measure of a lump sum for the redemption of weekly payments is a life annuity less deductions in respect of (1) the contingency of improvement in condition, and (2) the contingency of death at an earlier age than that of the average human life.

Notes.—This decision was affirmed by the Court of Appeal. See 2 W. C. C., at p. 158.

2829.—Grant and Aldcroft v. Conroy (1904), 6 W. C. C. 153—County Court.

Opinion of his Honour Judge Parry, that the amount of a lump sum to be paid by way of redemption should not be based on the actuarial value, but upon a business footing as between employer and workman.

III. *Right of Employer to make or discontinue Application.*

2830.—**Kendall and Gent, Ltd. v. Pennington** (1912), 106 L. T. 817 ; 5 B. W. C. C. 335 ; [1912] W. C. Rep. 144—C. A.

On an application to redeem weekly payments the county court judge found that the sum adequate for redemption was £258 ; but as he considered that it would not be for the workman's benefit for so large a sum to be paid to him at once, he dismissed the application.

HELD—that the employers' right to redeem under Schedule I., paragraph (17), was absolute, provision being made in that paragraph for investing the sum for the benefit of the workman in a case such as this.

Notes.—**Calico Printers' Association, Ltd. v. Higham** [2821] referred to.

2831.—**Dixon v. Patton** (1905), 120 L. T. J. 170—C. A. (Ir.)

HELD (by the Court of Appeal in Ireland)—that an employer who has commenced proceedings for redemption may discontinue such proceedings at any time on paying the workman the costs that he may have incurred.

Notes.—See also **Howell v. Blackwell** [2852].

SCHEDULE I., PARAGRAPHS (18) TO (22).

Workman residing Abroad.

Schedule I., paragraph (18).—If a workman receiving a weekly payment ceases to reside in the United Kingdom, he shall thereupon cease to be entitled to receive any weekly payment, unless the medical referee certifies that the incapacity resulting from the injury is likely to be of a permanent nature. If the medical referee so certifies, the workman shall be entitled to receive quarterly the amount of the weekly payments accruing due during the preceding quarter so long as he proves, in such manner and at such intervals as may be prescribed by rules of court, his identity and the continuance of the incapacity in respect of which the weekly payment is payable.

[For procedure, see Workmen's Compensation Rules, 1913, rr. 66 and 73—75. See also *Finnie and Son v. Duncan* [2750].]

Provisions against Assignment, etc.

Schedule I., paragraph (19).—A weekly payment, or a sum paid by way of redemption thereof, shall not be capable of being assigned, charged, or attached, and shall not pass to any other person by operation of law, nor shall any claim be set off against the same.

2832.—*Hosegood v. Wilson*, [1911] 1 K. B. 30 ; 80 L. J. K. B. 519 ; 103 L. T. 616 ; 27 T. L. R. 88—C. A.

A workman was injured in the course of his employment, and in respect thereof a weekly payment of 14*s.* 7*d.* was agreed to be paid as compensation. An application was subsequently made to review this payment as from February, 1910, and in June, 1910, the county court judge reduced the weekly payment to 10*s.* as from February. The weekly sum of 14*s.* 7*d.* was paid to the workman until the order for the reduced payment was made in June. The 10*s.* a week not having been paid, the workman applied for liberty to issue execution.

HELD—that, although the employer might have a right to recover from the workman the amount over-paid as from February, those over-payments could not be regarded as a payment in respect of the reduced amount ordered to be paid, and therefore that the employer was liable to pay the 10*s.* a week.

Opinion, *per* Cozens-Hardy, M.R., that the employers might have a right of action for the over-payments.

2833.—Rosewell Gas Coal Co. v. M'Vicar (1904), 7 F. 290; 42 S. L. R. 233—Ct. of Sess.

An employer who has been found liable to pay compensation by way of weekly payments under the Act to a workman is not entitled to set off against those payments a sum awarded to him as costs against a workman in an application for the diminution of the weekly payments.

2834.—Brown v. The South Eastern and Chatham Railway Co.'s Managing Committee (1910), 3 B. W. C. C. 428—C. A.

A workman in receipt of weekly payments of compensation may assent to the rent of his cottage, which he holds as tenant of his employers, being deducted from the compensation.

No Compensation during Suspension.

Schedule I., paragraph (20).—Where under this schedule a right to compensation is suspended no compensation shall be payable in respect of the period of suspension.

[The right to compensation may be suspended where the workman refuses to submit to or obstructs a medical examination under Schedule I., paragraphs (4), (14) and (15).]

Friendly Societies and certified Schemes.

Schedule I., paragraph (21).—Where a scheme certified under this Act provides for payment of compensation by a friendly society, the provisions of the proviso to the first sub-section of section eight, section sixteen, and section forty-one of the Friendly Societies Act, 1896, shall not apply to such society in respect of such scheme.

Application of Act to Ireland.

Schedule I., paragraph (22).—In the application of this Act to Ireland the provisions of the County Officers and Courts (Ireland) Act, 1877, with respect to money deposited in the Post Office Savings Bank under that Act shall apply to money invested in the Post Office Savings Bank under this Act.

SECOND SCHEDULE.

ARBITRATION, ETC.

Paragraphs (1) to (3).—(1) For the purpose of settling any matter which under this Act is to be settled by arbitration, if any committee, representative of an employer and his workmen, exists with power to settle matters under this Act in the case of the employer and workmen, the matter shall, unless either party objects by notice in writing sent to the other party before the committee meet to consider the matter, be settled by the arbitration of such committee, or be referred by them in their discretion to arbitration as hereinafter provided.

(2) If either party so objects, or there is no such committee, or the committee so refers the matter or fails to settle the matter within six months from the date of the claim, the matter shall be settled by a single arbitrator agreed on by the parties, or in the absence of agreement by the judge of the county court, according to the procedure prescribed by rules of court.

(3) In England the matter, instead of being settled by the judge of the county court, may, if the Lord Chancellor so authorises, be settled according to the like procedure, by a single arbitrator appointed by that judge, and the arbitrator so appointed shall, for the purposes of this Act, have all the powers of that judge.

Methods of Arbitration.

There are four kinds of arbitrators authorised by the Act :

- (1) A committee representative of employer and workmen.
- (2) A single arbitrator agreed by the parties.
- (3) The judge of the county court.
- (4) In England, if the Lord Chancellor so authorises, a single arbitrator appointed by the judge of the county court.

The powers and jurisdiction of a representative committee were fully discussed in *Mulholland v. Whitehaven Colliery Co.* [2835]. Where a committee has made an award, either party has the right to object to the submission of any fresh issue to the committee and may make an application to the county court judge (*R. v. Templer* [2836]). Where an arbitrator is appointed by the county court judge an appeal does not lie from such arbitrator direct to the Court of Appeal (*Gibson v. Wormald and Walker, Ltd.*, [2837]). An application to extend the time for appealing from such an award will therefore not be entertained (*Gray v. Southend Corporation* [2838]). As to procedure in cases of arbitrators so appointed, see Workmen's Compensation Rules, 1918, rr. 31—33.

The method of procedure in arbitrations in the county court is mentioned in rule 29 of the Workmen's Compensation Rules, 1918.

The county court judge when sitting as arbitrator under the Act has no power to grant a new trial (*Mountain v. Parr* [2839]); or to order interrogatories (*Sutton v. Great Northern Railway Co.* (No. 1) [2840]). He has a wide discretion as to the amendment of particulars, but it must not be exercised so as to prejudice the other party (*Proprietors of Hay's Wharf, Ltd. v. Brown* [2841]; *Sidney v. Collins, Son & Co.* [2842]; see also *Casey v. Humphries* (No. 1) [2843] and *O'Donnell v. Wilson* [2844]). As to the amendment of a respondent's answers, see *Silvester v. Cude* [2845]. The judge may alter his award at any time before it is signed and sealed (*John Morelem & Co. v. Dunne* [2846]). The arbitration is a judicial proceeding, and so an indictment for perjury will lie (*R. v. Crossley* [2847]). Form 24 in the Appendix to the Workmen's Compensation Rules is not *ultra vires* the Act (*Higgins v. Poulson* (No. 2) [2848]). The judge may competently dismiss a claim as irrelevant without hearing proof, if he finds on the averments in the application that there is no cause of action (*Coyne v. Glasgow Steam Coasters Co., Ltd.* [2849]), but he may not make an award in default of appearance (*United Collieries v. Gavin* [2850]).

The cases are divided as follows :—

- I. Representative Committee.
- II. Arbitrator appointed by County Court Judge.
- III. Procedure.

I. *Representative Committee.*

2835.—*Mulholland v. Whitehaven Colliery Co.*, [1910] 2 K. B. 278 ; 79 L. J. K. B. 987 ; 102 L. T. 663 ; 26 T. L. R. 462—C. A.

Where within clause (1) of Schedule II. to the Workmen's Compensation Act, 1906, there exists a committee representative of an employer and his workmen, with power to settle matters under the Act in the case of the employer and workmen, that is the body to which, for the purpose of settling any matter which under the Act is to be settled by arbitration, the parties are to go, unless either party objects by notice in writing before the committee meet to consider the matter. It is not necessary that each individual workman, on entering into the contract of employment, should agree to refer any dispute under the Act to such committee.

The committee is not a scheme which requires to be certified under s. 3 of the Act ; it is bound by the provisions of the Act, and any award that it makes must follow those provisions and must relate to a matter which under the Act is required to be settled by arbitration. The county court judge is not entitled to treat such an award as though it were simply an agreement between the workman and his employer which might be reviewed under proviso (d) of clause (9) of Schedule II. It is an award binding upon both parties which ought to be recorded under clause (9) subject to the conditions therein mentioned, but with which the registrar or the county court judge has no power to interfere.

Semble, per Cozens-Hardy, M.R., and Kennedy, L.J., a workman who is an infant may be bound by an award of this kind.

Apart from the case of death, there is no jurisdiction to award a lump sum to a workman by way of compensation except under clause (17) of Schedule I. of the Act, where a weekly payment has been continued for not less than six months, and then only on the application of the employer.

On March 1st, 1909, a workman, an infant, whilst working in a colliery, met with an accident whereby he lost two fingers of his right hand. His earnings were 9s. 1d. per week, and his employers paid him compensation at that rate weekly up to July 19th, 1909, when he resumed work at the same wages as before the accident. A committee representative of the employers and their workmen, at his request for a lump sum, awarded him £100 in satisfaction of all claims under the Act in respect of the permanent injury to his hand, and the money was paid into the county court. The judge refused to record a memorandum of the award on the ground of the inadequacy of the amount agreed to be paid to the applicant, a person under legal disability, but ordered the money to remain in court.

HELD—that the judge was right in refusing to register the memorandum, not on the ground on which he acted, but because the matter was not within the jurisdiction of the committee, and that the £100 must be paid out to the employers.

Notes.—*Rhodes v. Soothill Wood Colliery Co.*, [1909] 1 K. B. 191 [2743], referred to.

2836.—*R. v. Templer*, [1912] 2 K. B. 444 ; 81 L. J. K. B. 805 ; 106 L. T. 855 ; 28 T. L. R. 410 ; 56 S. J. 501 ; 5 B. W. C. C. 455 ; [1912] W. C. Rep. 209—C. A.

A workman in receipt of compensation having accepted his employers' offer of light work at his former wages was awarded the reduced weekly wages of 1*d.* by a committee representative of employers and workmen under the Workmen's Compensation Act, 1897. Afterwards, finding himself unable to do the light work, he applied to the county court for a review of the weekly payment and gave due notice to his employers that he objected to his application being settled by the committee. On the application coming before the county court judge, the latter held that he had no jurisdiction to hear the application.

HELD—that the application was a reconsideration of the matter under fresh circumstances, and that the Act gave to either party the right to object to the submission of any fresh issue to the representative committee at any time before the committee met to consider that fresh issue, and therefore that the county court judge had jurisdiction to hear the application.

II. *Arbitrator appointed by County Court Judge.*

2837.—*Gibson v. Wormald and Walker, Ltd.*, [1904] 2 K. B. 40 ; 73 L. J. K. B. 491 ; 91 L. T. 7 ; 52 W. R. 661 ; 68 J. P. 382 ; 20 T. L. R. 452—C. A.

No appeal lies direct to the Court of Appeal from the award of an arbitrator appointed by a county court judge to assess a claim for compensation under the Workmen's Compensation Act, 1897.

2838.—*Gray v. Southend Corporation*, [1913] W. C. & I. Rep. 393 ; 6 B. W. C. C. 932—C. A.

No appeal lies direct to the Court of Appeal from the award of an arbitrator appointed by a county court judge under Schedule II., clause (3), of the Workmen's Compensation Act, 1906. An application to extend the time for appealing from such an award will therefore not be entertained.

Notes.—*Gibson v. Wormald and Walker, Ltd.* [2837], followed.

III. *Procedure.*

2839.—*Mountain v. Parr*, [1899] 1 Q. B. 805 ; 68 L. J. Q. B. 447 ; 80 L. T. 342 ; 47 W. R. 353 ; 15 T. L. R. 262—C. A.

A county court judge has no power to entertain an application for a new trial of an arbitration under the Workmen's Compensation Act, 1897.

Notes.—*Per A. L. Smith, L.J.* : " When sitting to hear applications under this Act a county court judge is sitting merely as an arbitrator. . . . Then the question arises, can an arbitrator grant a new trial ? That question has only to be put in order to be answered, he clearly cannot do so."

2840.—Sutton v. Great Northern Railway Co. (No. 1), [1909] 2 K. B. 791; 79 L. J. K. B. 81; 101 L. T. 175—C. A.

A county court judge sitting to hear an application for compensation under the Workmen's Compensation Act, 1906, is acting as an arbitrator only, and has no jurisdiction to make an order for discovery before hearing either by affidavit of documents or by interrogatories.

Notes.—*Mountain v. Parr* [2839] applied.

Farwell, L.J., in judgment said that he would like to adopt the following statement of Lord Halsbury in *Powell v. Main Colliery Co., Ltd.*, [1900] A. C. 366 [2279]. "Rules made under this or any other provision of the Act have not such effect as to derogate from the rights conferred by the Act itself, nor is the interpretation, which the framers of the rules in any case seemed to have placed upon the Act, any evidence of the meaning of the words of the Act."

2841.—Proprietors of Hay's Wharf, Ltd. v. Brown (1911), 3 B. W. C. C. 84—C. A.

A workman sustained injury to his thumb. Liability was admitted, and weekly payments were made. The employers then asked him to undergo a course of massage at their expense; he agreed and went to the hospital, where, however, he refused to submit to the breaking down of the adhesions under an anæsthetic, which was a necessary preparation for the massage. Later, the employers applied for termination of the weekly payments on the ground that the man had unreasonably refused to have the top joint of his thumb amputated.

The county court judge stated that he thought the refusal to have the adhesions broken down was covered by the employers' application, but that to prevent any doubt on this point he would amend the particulars; he then found that that refusal was unreasonable, and terminated the compensation.

HELD (Farwell, L.J., *diss.*)—that as the employers had failed to prove the only refusal (amputation) alleged as unreasonable in their particulars, their application failed, and that they were debarred from raising the question of the other refusal (massage), as it was a distinct issue which had not been raised on the particulars given to the workman, and which was too serious to be imported into the case by amendment at the hearing.

Notes.—*Per* Fletcher Moulton, L.J.: "I think this case is an important one on the ground that the workman is entitled to rely on the formal documents so far as concerns meeting the case that is raised, and I think it would be a gross injustice to compel either of the parties to meet a case which is wholly different to the one that he has been called upon to meet."

2842.—Sidney v. Collins, Son & Co. (1910), 3 B. W. C. C. 433—C. A.

A workman stated in his particulars that the effect of an accident was a rupture on the left side. The county court judge, sitting with

a medical assessor, found that he never had been ruptured, but that there had been disabling effects of the accident of which no mention had been made in the particulars. The workman then applied for leave to amend his particulars to include those effects. The judge refused and made an award in favour of the respondents.

HELD—that the workman was only required to state the nature of his injury, and that where there was a mere technical misdescription of the effects no amendment was needed.

Notes.—*Per* Cozens-Hardy, M.R. : “ It would be nothing less than a scandal if, because the applicant did not properly describe the nature of the injury which he had undoubtedly incurred on that part of his body which he describes in his particulars, he should be deprived of his remedy under the Act.”

2843.—*Casey v. Humphries* (No. 1) (1912), 5 B. W. C. C. 625 ; [1912] W. C. Rep. 366—C. A.

A workman brought proceedings for compensation under the Workmen's Compensation Act, 1906. The employers did not raise the defence of serious and wilful misconduct either in their answer or in the correspondence. At the hearing they raised this defence and gave evidence thereon. The workman applied for an adjournment in order to call evidence in rebuttal of the employers' evidence of serious and wilful misconduct. The county court judge refused the application and found that there was serious and wilful misconduct disentitling the workman to compensation.

HELD—that there must be a re-hearing.

2844.—*O'Donnell v. Wilson*, [1910] S. C. 799 ; 47 Sc. L. R. 707—Ct. of Sess.

In proceedings under the Workmen's Compensation Act, 1906, a workman claimed compensation from H., and subsequently, during the arbitration, asked leave to substitute the name of H. & Co. as respondents instead of H. The sheriff refused the application as incompetent.

HELD—that it was competent for the sheriff to allow the name of H. & Co. to be added as additional respondents, and remitted the case to him to allow the amendment in that form.

Opinion, *per* Lord Johnston, that rule 79 of the First Schedule to the Sheriff Courts (Scotland) Act, 1907, does not apply to arbitration proceedings under the Workmen's Compensation Act, 1906.

Opinions reserved, *per* Lord Kinnear and Lord Salvesen.

2845.—*Silvester v. Cude* (1899), 15 T. L. R. 434—C. A.

Quære, whether, in a case where rule 17 (4) of the Workmen's Compensation Rules, 1898, applies, the county court judge has jurisdiction to do anything beyond one or other of the two courses there specified.

Notes.—*Per* A. L. Smith, L.J. : “ He thought that where the respondent failed to file an answer, the county court judge might

take either of the courses mentioned in the rule, but that he was not bound to take either. There seemed to him to be nothing compulsory in the rule."

Per Vaughan Williams, L.J. : " He did not think it was necessary in this case to determine the meaning of the rule, but he wished not to be taken as agreeing that where the rule applied the county court judge had jurisdiction to do anything except one or other of the two things mentioned in the rule."

See now rule 18 (4) of the Workmen's Compensation Rules, 1913.

2846.—*John Mowlem & Co. v. Dunne*, [1912] 2 K. B. 136 ; 81 L. J. K. B. 777 ; 106 L. T. 611 ; 5 B. W. C. C. 382 ; [1912] W. C. Rep. 298—C. A.

A county court judge has no power to alter his award after it has been signed and sealed unless there has been an accidental slip or omission within rule 28 (2) of the Workmen's Compensation Rules, 1907—1911.

A workman having sustained personal injury by accident arising out of and in the course of his employment, an agreement for compensation by his employers was recorded. The employers having applied for the review, termination, or diminution of the weekly sum payable to the workman, the county court judge reduced the compensation and directed that the employers should pay the costs. After the court rose he added a note that on further consideration he directed the award to be without costs, and his signature was placed after that note. In the award as drawn up no costs were awarded to either party. The workman applied that the award might be corrected under rule 28 (2) of the Workmen's Compensation Rules, 1907—1911, by awarding costs to him, on the ground that the award as drawn up differed from that made by the judge at the hearing.

HELD—that the judge had power to alter his award until it was signed and sealed within rule 28 (1), but not afterwards.

Notes.—See now Workmen's Compensation Rules, 1913, r. 30.

2847.—*R. v. Crossley*, [1909] 1 K. B. 411 ; 78 L. J. K. B. 299 ; 100 L. T. 463 ; 73 J. P. 119 ; 25 T. L. R. 225 ; 53 S. J. 214 ; 22 Cox, C. C. 40—C. C. A.

An arbitration before a county court judge under s. 1, sub-s. 3, of the Workmen's Compensation Act, 1906, is a judicial proceeding, and the wilful and corrupt giving of false evidence at such a proceeding is perjury at common law.

2848.—*Higgins v. Poulson* (No. 2), [1912] 2 K. B. 292 ; 81 L. J. K. B. 690 ; 106 L. T. 518 ; 28 T. L. R. 323 ; 5 B. W. C. C. 340 ; [1912] W. C. Rep. 244—C. A.

In all ordinary cases under the Workmen's Compensation Act, 1906, where a workman has sustained an injury by accident arising out of and in the course of his employment, resulting in his total incapacity for the time being, and entitling him to a weekly payment

by way of compensation, the arbitrator ought to make his award in accordance with Form 24 in the Appendix to the Workmen's Compensation Rules, 1907, ordering the weekly payments to continue during the total or partial incapacity of the claimant for work, or until the payments shall be ended, diminished, increased, or redeemed in accordance with the Act.

Form 24 is *intra vires* and entirely consistent with the policy of the Act.

Notes.—*Higgins v. Poulson* (No. 1), 5 B. W. C. C. 66 [2207], referred to.

See now Form 24, Workmen's Compensation Rules, 1913.

2849.—*Coyne v. Glasgow Steam Coasters Co., Ltd.*, [1907] S. C. 112 ; 44 Sc. L. R. 118—Ct. of Sess.

A sheriff acting as arbitrator under the Workmen's Compensation Act, 1897, may competently dismiss a claim as irrelevant without hearing proof, if he finds that the averments of the plaintiff disclose no cause of action.

Notes.—*Per* Lord Kyllachy : " We all know that both in the Sheriff Court and in this court there is a disposition not to decide doubtful questions of relevancy, but unless the irrelevancy is clear, to allow a proof before answer. But if the irrelevancy is clear—if the pursuer's averments disclose no cause of action—that is a different matter, and what we have to decide is whether the appellant's case is not on his own statement clearly outside the statute."

The actual point under discussion in the above case was whether a dock was a " factory " within the meaning of the 1897 Act, and thus could not arise under the present Act, but it is submitted that the principle enunciated above is still applicable.

2850.—*United Collieries v. Gavin* (1899), 2 F. 60 ; 37 Sc. L. R. 47—Ct. of Sess.

It is not competent for a sheriff, acting as arbitrator, under the Workmen's Compensation Act, 1897, to make an award by default of appearance.

Notes.—*Per* Lord Adam : " It is the sheriff who is appointed arbiter. As arbiter he accordingly sits and adjudicates, and it is so acting as arbiter that he has to settle the amount due. The claim made here was for certain weekly payments. Now, it is perfectly obvious that such a claim requires a proof, because the sheriff cannot possibly of his own knowledge be aware of the proper amount."

Per Lord M'Laren : " It seems to me that for an arbiter to make a penal award ' in respect of no appearance ' is going outside the confines of the question submitted to him."

APPEALS.

Schedule II., paragraph (4).—The Arbitration Act, 1889, shall not apply to any arbitration under this Act; but a committee or an arbitrator may, if they or he think fit, submit any question of law for the decision of the judge of the county court, and the decision of the judge on any question of law, either on such submission, or in any case where he himself settles the matter under this Act, or where he gives any decision or makes any order under this Act, shall be final, unless within the time and in accordance with the conditions prescribed by rules of the Supreme Court either party appeals to the Court of Appeal; and the judge of the county court, or the arbitrator appointed by him, shall, for the purpose of proceedings under this Act, have the same powers of procuring the attendance of witnesses and the production of documents as if the proceedings were an action in the county court.

Firstly, court to which appeal lies. An appeal lies, under the present Act, direct to the Court of Appeal where the judge “gives any decision or makes any order under this Act.” Thus an appeal lies to the Court of Appeal from a decision of the judge on a preliminary point of law (*Moss v. Great Eastern Railway* [2305]), or where an order is made for payment of a lump sum as costs of an arbitration (*Beadle v. S.S. Nicholas (Owners)* [2904]), but an appeal from his refusal to entertain jurisdiction lies to the Divisional Court (*Howarth v. Sir B. Samuelson & Co.* [2851]), and so does an appeal from an award that the liquidator in a voluntary winding-up should pay the workman a certain sum (*Homer v. Gough* [2381]), or from an order relating to the detention of a ship (*Panagotis v. S.S. Pontiac (Owners)* (No. 1) [2434]). There is no appeal from a consent order (*Howell v. Blackwell* [2852]). Under the Act of 1897 appeals against the refusal of the judge to give directions for the taxation of costs and other similar matters lay to the Divisional Court. *Rigby v. Cox* (No. 1) [2855] and other cases are mentioned on this point.

Secondly, time for appeal and extension of time for appeal. The time for appealing runs from the date when the award is signed by the judge (*Clayton v. Jones' Sewing Machine Co., Ltd.* [2857]; see also *Fox v. Battersea Borough Council* [2213]). The extension of time for appealing is absolutely in the discretion of the Court of Appeal in England (see R. S. C., Order 58, r. 15, and note amendment of August, 1913. See also *Taff Vale Railway v. Lane* (No. 1) [2858]). Prior to 1909 extension of time was only granted under exceptional circumstances (see *Nicholson v. Piper* (No. 2) [2860]). An extension was granted in Ireland in *Henneberry v. Doyle Brothers* (No. 1) [2859].

Thirdly, duty of county court judge to take notes. It is the duty of the county court judge to take a note of the evidence whether he is requested to do so or not (*Brine v. Corry* [2862]); *Rayman v. Fields* (No. 1) [2863]). If the notes are unintelligible, the case will be remitted for a proper note to be supplied or a new trial will be ordered (*Griffiths v. Wynnstay Collieries* [2865]). Several other cases are mentioned on this point; see also Workmen's Compensation Rules, 1913, r. 36).

Fourthly, costs of appeal. The Court of Appeal cannot, after judgment has been given specifically dealing with costs, alter their judgment by ordering that the costs of the appeal shall be the costs in the arbitration so as to enable the appeal costs to be set off against costs in the arbitration (*Barnett v. Port of London Authority* (No. 2) [2867]). The court may order that the costs on appeal should be the appellant's costs in the arbitration in any event, but unless the Court of Appeal makes such an order the arbitrator has no power to set off such costs against the costs of the workman in the arbitration (*Sutton v. Great Northern Railway* (No. 2) [2868]). Usually the costs of appeal of an unsuccessful appellant will be set off against his costs in the court below (*Case v. Colonial Wharves* [2869]). If the respondents unreasonably refuse their consent to the withdrawal of an appeal they will have to pay the costs of the application to withdraw (*Stephens v. Vickers, Ltd.* [2870]).

Fifthly, security for costs. Security for costs will be ordered if it appears that the appellant will, if unsuccessful, be unable through poverty to pay the respondent's costs of appeal (*Hall v. Snowden, Hubbard & Co.* (No. 1) [2871]; *Rees v. Richards* [2872]), although this is not the practice in Ireland (*Stormont v. Workman, Clark & Co.* [2873]). Before applying to the court the respondent ought first to apply to the appellant for security (*Stanland v. North-Eastern Steel Co.* (No. 1) [2874]). It was formerly the practice not to order security for costs where the poverty of the appellant was due to the accident (*Skeggs v. Keen* (No. 1) [2875]), or where an important new point of law was raised (*Hubball v. Everitt* [2876]), but it would appear that such exceptions will no longer be made (*Brine v. May, Ellis, Grace & Co.* (No. 1) [2878]). The fact that the case is being conducted by a trade union does not affect the question of security for costs (*McLaughlin v. Clayton* [2879]; *Haddock v. Humphrey* [2880]). An appeal under the Act is not in the nature of a new trial, in which security for costs will not be ordered (*Harwood v. Abrahams* [2881]). As to extension of time for giving security, see *Perry & Co., Ltd. v. Lacey* [2882].

Sixthly, no appeal against part of an award. No attempt to approbate and reprobate an award will be allowed, as it is indivisible (*Johnson v. Newton Fire Extinguisher Co.* [2883]; *Stroewer v. Aerogen Gas Co.* [2884]).

Seventhly, miscellaneous. There can be no appeal on a question of fact (*Nelson v. Allan Brothers & Co. (U. K.) Ltd.* [2978]; *Goff v. Airds* [2885]), nor on a point of law not taken in the court below (*Payne v. Clifton* [2886]; *Smith v. Foster* [2893]). As to an appeal on behalf of a lunatic see *Kerr and Another v. Stewart* [2887]. Where infants are concerned in a suggested compromise the matter will be sent to the official solicitor (*Coulson v. Worshipful Company of*

Drapers [2888]). Where an order is in substance a consent order no appeal will lie (*Moffat v. Armstrong* [2889]). An order of the House of Lords may be made an order of the Court of Appeal (*Hodgson v. West Stanley Colliery Co.* (No. 2) [2890]). The notice of appeal must sufficiently state the grounds of appeal (*Barton v. Scott and Hodgson* [2892]).

For procedure see R. S. C., Order 58, rule 20, and Order 59, rules 10, 12, 14, and 16, and Workmen's Compensation Rules, 1913, rules 86 and 87.

The cases are divided as follows :—

- I. Court to which Appeal lies.
- II. Time for Appeal and Extension of Time for Appeal.
- III. Duty of County Court Judge to take Notes.
- IV. Costs of Appeal.
- V. Security for Costs.
- VI. No Appeal against Part of an Award.
- VII. Miscellaneous.

I. *Court to which Appeal lies.*

N.B.—See *Moss v. Great Eastern Railway*, [1909] 2 K. B. 274 [2305].

2851.—*Howarth v. Sir B. Samuelson & Co.* (1911), 104 L. T. 907 ; 4 B. W. C. C. 287—C. A.

In a case under the Workmen's Compensation Act, 1897, the injured workman was awarded full compensation during incapacity by a representative committee. Later the payments were reduced by agreement to 1*d.* per week. On an application by the workman to the county court for a review and increase of the 1*d.* per week, the county court judge declined to entertain jurisdiction, and refused to hear the application.

HELD—that (under the Act of 1897) an appeal from his refusal to entertain jurisdiction lay to the Divisional Court and not to the Court of Appeal.

2852.—*Howell v. Blackwell* (1912), 5 B. W. C. C. 293 ; [1912] W.C. Rep. 186—C. A.

An injured workman for some months had been in receipt of partial compensation when he applied for review and increase of the amount. Before this application was filed the employers had filed an application to redeem their liability to make the weekly payments, although at the date of the application these payments had been continued for only four months. The application for review was heard first and dismissed by the judge, and he then immediately, by consent of the parties, proceeded to hear the application to redeem. He made an award for redemption for permanent partial incapacity based on the rate of compensation which the workman then received. The workman appealed against both orders.

HELD—that the order for redemption was in the nature of a consent order, and that in consequence no appeal would lie from either order.

Notes.—*Calico Printers' Association, Ltd. v. Higham*, [1912] 1 K. B. 93 [2821], referred to.

2853.—*Handford v. Clarke*, [1907] 1 K. B. 181 ; 76 L. J. K. B. 958 ; 96 L. T. R. 175 ; 9 W. C. C. 136—C. A.

A respondent to an appeal will be allowed to appear *in formâ pauperis* to resist the appeal without producing the opinion of counsel.

2854.—*Hoddinott v. Newton, Chambers & Co.*, [1901] A. C. 49 ; 70 L. J. Q. B. 150 ; 84 L. T. R. 1 ; 17 T. L. R. 134—H. L.

An appeal to the Court of Appeal lies against the decision of the judge on a request to assess compensation under s. 1, sub-s. 4, as the judge then becomes an arbitrator under the Act.

Notes.—*Per Lord Shand*: “It is more than doubtful whether the question really in dispute, as it has been argued in the Court of Appeal and again in this House, was clearly before the learned judge of the county court. The claim which was made under the Employers’ Liability Act of 1880, which failed, suddenly became before him a claim under the Workmen’s Compensation Act, 1897, under which he came to act as arbitrator. The actual decision in this case turned on the meaning of the words ‘on, in, or about a building,’ and is no longer applicable under the present Act.”

See also *Homer v. Gough* [2381]; *Williams v. Army and Navy Co-operative Society* [2242]; *Panagotis v. S.S. Pontiac (Owners)* (No. 1) [2434]; *Gibson v. Wormald and Walker* [2837].

[N.B.—The words “where he gives any decision or makes any order under this Act” did not appear in the Act of 1897, and it was consequently held that appeals on the following matters should go to the Divisional Court and not to the Court of Appeal.

(1) From the order of the county court judge refusing to direct the registrar to review taxation of costs.

2855. *Rigby v. Cox* (No. 1), [1904] 1 K. B. 358; 73 L. J. K. B. 80; 89 L. T. R. 717; 20 T. L. R. 136; 6 W. C. C. 158—C. A.
See also *Keane v. Nash* (No. 2), 88 L. T. 790 [2243].

(2) From an order made on insurers under s. 5 of the 1897 Act.
See *Kniveton v. Northern Employers’ Mutual Indemnity Co.*, [1902] 1 K. B. 880 [2378], and *Morris v. Northern Employers’ Mutual Indemnity Co.*, [1902] 2 K. B. 165 [2379].

(3) From the refusal to make such an order.

2856. *Leech v. Life and Health Assurance Association*, [1901] 1 K. B. 707; 70 L. J. K. B. 544; 84 L. T. R. 414; 17 T. L. R. 354; 3 W. C. C. 202—C. A.]

II. *Time for Appeal and Extension of Time for Appeal.*

N.B. See R. S. C., Order 58, rule 15, and note amendment of August, 1913.

2857.—*Clayton v. Jones’ Sewing Machine Co., Ltd.*, [1908] W. N. 253; 126 L. T. J. 142—C. A.

Where a county court judge makes an award either in favour of the employer or of the workman, the time for appealing runs from the date when the award is actually signed and perfected and not from the date the judgment making the award is delivered.

See also *Fox v. Battersea Borough Council* (1911), 4 B. W. C. C. 261 [2213].

2858.—*Taff Vale Railway v. Lane* (No. 1) (1910), 3 B. W. C. C. 259—C. A.

The Court of Appeal allowed an appeal to stand over until the next time workmen’s compensation appeals were taken, on the

ground that there had been a difficulty in obtaining the judge's notes.

2859.—Henneberry v. Doyle Brothers (No. 1), [1912] W. C. Rep. 145; 46 Ir. L. T. 61—C. A. (Ir.)

An application for compensation was heard and decided by the county court judge on September 29th, and on October 25th he signed his award. On November 5th the solicitor for the respondents received from the Clerk of the Crown and Peace a certified copy of the award, the terms of which conveyed to him that the award was signed on November 2nd. He accordingly calculated from that date the twenty-one days allowed for notice of appeal.

HELD—that a miscarriage having occurred for which the respondents were in no way responsible, they should, notwithstanding the expiration of the prescribed time, be given leave to appeal.

2860.—Nicholson v. Piper (No. 2) (1907), 24 T. L. R. 16; 9 W. C. C. 132—C. A.

The fact that the legal adviser of a workman was of opinion that it was impossible in the circumstances successfully to appeal against a certain order made under the Workmen's Compensation Act, 1897, is no ground for subsequently extending the time for appealing from that order.

Notes.—*International Financial Society v. City of Moscow Gas Co.*, 7 Ch. D. 241; *In re Manchester Economic Building Society*, 24 Ch. D. 488, and *In re Coles and Ravenshear*, [1907] 1 K. B. 1, applied. See also *Wheeler, Ridley & Co. v. Dawson* [2795].

III. *Duty of County Court Judge to take Notes.*

2861.—Practice Note, *Times*, December 18th, 1908—C. A.

Under rule 34 of the Workmen's Compensation Rules, 1907, the county court judge ought to take a note, for the assistance of the Court of Appeal, of every point which in any reasonable aspect of the case can come before the Court of Appeal, even though his attention is not called by the representatives of either side to the necessity of so doing. The parties ought not to have the burden of taking shorthand notes, the use of which on appeal is discouraged.

2862.—Brine v. Corry (1905), *Times*, May 5th; 7 W. C. C. 130—C. A.

It is the duty of the county court judge to take a note of the evidence, whether he is requested to do so or not.

If there are no notes of the evidence given at the arbitration, the case may be remitted for a rehearing.

2863.—Rayman v. Fields (No. 1) (1910), 102 L. T. 154; 26 T. L. R. 274—C. A.

It is the duty of the county court judge in an arbitration under the Workmen's Compensation Act, 1906, to take a full note of the

evidence and of any question of law raised, even although no request is made to him to do so.

Notes.—*Brine v. Corry* [2862] referred to.

2864.—*Gellyceidrim Colliery Co., Ltd. v. Rogers* (1909), 3 B. W. C. C. 62—C. A.

Case sent back to the county court judge for a rehearing, on the ground that the judge's notes were largely unintelligible, and also because it was plain that he had misdirected himself on the workman's earning capacity before the accident.

2865.—*Griffiths v. Wynnstay Collieries* (1909), 2 B. W. C. C. 450—C. A.

Where it does not appear from the judge's notes how he arrived at his decision, the court of Appeal will order a new trial.

2866.—*Leeds and Liverpool Canal Co. v. Hesketh* (1910), 3 B. W. C. C. 301—C. A.

The Court of Appeal permitted an affidavit of a doctor and of the solicitor engaged in the arbitration proceedings to be read for the purpose of supplementing the notes of the county court judge.

See also *Griggs v. Steam Trawler Gamecock (Owners)* [1970]; *Tomlinson v. Garratt's Ltd.* [1999]; *Edmunds v. S.S. Peterson (Owners)* [2073]; *Turner v. Miller and Richards* [2548]; *Jones v. Tirdonkin Colliery Co.* [2791].

IV. *Costs of Appeal.*

2867.—*Barnett v. Port of London Authority* (No. 2) [1913] W. C. & I. Rep. 414; 82 L. J. K. B. 918; 108 L. T. 944; 57 S. J. 577; 6 B. W. C. C. 465—C. A.

The Court of Appeal cannot, after judgment has been given specifically dealing with costs, alter their judgment by ordering that the costs of the appeal shall be costs in an arbitration in the county court under the Workmen's Compensation Act, 1906, so as to enable the appeal costs to be set off against costs in the arbitration.

2868.—*Sutton v. Great Northern Railway Co.* (No. 2) (1910), 3 B. W. C. C. 160—C. A.

A county court judge has no jurisdiction to set off costs awarded to an employer on an interlocutory appeal by the Court of Appeal against the costs of the workman in the subsequent arbitration, unless the Court of Appeal order that the costs awarded to the employer on appeal shall be the employer's costs in the arbitration in any event.

2869.—*Case v. Colonial Wharves, Ltd.* (1905), 53 W. R. 514—C. A.

Where an applicant under the Workmen's Compensation Act appeals unsuccessfully against the amount of compensation awarded

him, the costs of appeal will be set off against his costs in the court below.

2870.—*Stephens v. Vickers, Ltd.* (1913), 6 B. W. C. C. 469 ; [1913] W. C. & I. Rep. 454—C. A.

The employers wished to withdraw notice of appeal. They had paid the taxed costs of the arbitration. The workman refused except on condition that the employer paid certain further costs. The employers thereupon made an application to the Court of Appeal for leave to withdraw.

HELD—that the employers were entitled to the costs of the application to withdraw, and that the workman was entitled only to taxed costs up to the time of the employers' notice of withdrawal, such costs to be set off against the costs of the application to withdraw.

V. *Security for Costs.*

2871.—*Hall v. Snowden, Hubbard & Co.* (No. 1), [1899] 1 Q. B. 593 ; 68 L. J. Q. B. 363 ; 80 L. T. 256 ; 47 W. R. 322 ; 15 T. L. R. 244—C. A.

In an appeal from a county court judge to the Court of Appeal under the Workmen's Compensation Act, 1897, if it appears that the appellant will, if unsuccessful, be unable through poverty to pay the respondent's costs of the appeal, he will, in accordance with the ordinary practice of the Court of Appeal, be ordered to give security for such costs.

2872.—*Rees v. Richards* (1899), *Times*, August 8th ; 1 W. C. C. 118—C. A.

The court may order security for the costs of appeal where the appellant, though poor, is not able to make the affidavit required for appeals *in formâ pauperis*.

2873.—*Stormont v. Workman, Clark & Co.* (1899), 33 Ir. L. T. 165—C. A. (Ir.)

The Court of Appeal in Ireland refused to order security for costs on the ground of the poverty of the applicant.

Notes.—Lord Justice Fitzgibbon pointed out that although the English courts have held that poverty alone is a "special circumstance" justifying the ordering of security, the Irish courts have distinctly refused to so hold. The court refused to follow *Hall v. Snowden, Hubbard & Co.* [2871], and adhered to its own rule of practice, laid down in *M'Donnell v. Alcorn*, 28 Ir. L. T. 64, and *Brookes v. Kavanagh*, 21 Ir. L. T. 474.

2874.—*Stanland v. North-Eastern Steel Co.* (No. 1) (1906), 23 T. L. R. 1 ; 51 S. J. 12—C. A.

Before applying to the court for security for the costs of an appeal under the Workmen's Compensation Act upon the ground of the

appellant's poverty, the respondent ought first to apply to the appellant for security.

2875.—Skeggs v. Keen (No. 1) (1899), *Times*, May 16th ; 1 W. C. C. 119—C. A.

Security for costs will not be ordered where the poverty of the appellant is due to the accident, and the affidavit required for leave to appeal *in formâ pauperis* cannot be made.

Notes.—Probably the courts would now order security in a case of this kind ; see *Brine v. May, Ellis, Grace & Co.* [2878].

2876.—Hubball v. Everitt & Sons (1900), 16 T. L. R. 168—C. A.

Where an award was made in favour of the employers, but execution stayed pending an appeal, the court refused to order security for costs.

Notes.—A. L. Smith, L.J., said that he thought this case ought to be treated as an exception to the ordinary rule. See now *Brine v. May, Ellis, Grace & Co.* [2878].

2877.—Shea v. Drolenvaux (1903), 88 L. T. 679 ; 19 T. L. R. 473—C. A.

An order for security for the costs of an appeal under the Workmen's Compensation Act, 1897, will be ordered in a proper case, even if the county court judge has stayed execution with a view to an appeal.

Notes.—*Hubball v. Everitt & Sons* [2876] distinguished as being a special case which was treated as an exception to the ordinary rule.

2878.—Brine v. May, Ellis, Grace & Co. (No. 1) (1913), 6 B. W. C. C. 460 ; [1913] W. C. & I. Rep. 648.

The respondent to an appeal is entitled to an order for security of costs on satisfying the court that the appellant would not be in a position to pay the costs if his appeal should be dismissed.

Notes.—In answer to the contention that where the case raised an important new point of law security should not be ordered, in support of which counsel cited *Hubball v. Everitt & Sons* [2876], Buckley, L.J., said : “ No doubt that at one time was the rule, but all the court has to decide now in a case of this sort is whether there is evidence that the appellant will be unable to pay the costs, if unsuccessful.”

2879.—McLaughlan v. Clayton (1899), *Times*, February 28th ; 1 W. C. C. 116. —C. A.

The fact that the case is being conducted on behalf of the applicant by a trade union does not affect the question of security for costs of appeal.

2880.—Haddock v. Humphrey (1899), *Times*, August 1st ; 1 W. C. C. 117—C. A.

Although the costs of the arbitration have been paid by a trade union, the court may order security for costs of appeal.

2881.—Harwood v. Abrahams, [1901] 2 K. B. 304 ; 70 L. J. K. B. 746 ; 84 L. T. 857—C. A.

The rule that no security for costs is required on an application to the Court of Appeal under the Supreme Court of Judicature Act, 1890, for the new trial of an action in the King's Bench Division will not be extended to an appeal under the Workmen's Compensation Act, 1897, which, if successful, will practically result in a new trial of the case.

2882.—Perry & Co., Ltd. v. Lacey (1911), 5 B. W. C. C. 1.

Where an appellant has been ordered to give security for costs within a certain time, and does not comply with that order, the court will not entertain any application for an extension of time without the consent of the other party, not even where the appellant has obtained leave to appeal *in formâ pauperis*, but the order for this has not been drawn up until after the time for giving security has expired.

VI. *No Appeal against Part of an Award.*

2883.—Johnson v. Newton Fire Extinguisher Co., Ltd., [1913] 2 K. B. 111 ; 82 L. J. K. B. 541 ; [1913] W. C. & I. Rep. 352 ; 108 L. T. 360 ; 6 B. W. C. C. 202—C. A.

Where an award has been made under the Workmen's Compensation Act, 1906, for payment of a weekly sum as compensation to a workman, and the award contains an order for payment of certain costs by the workman with liberty to the employers to set off such costs at a certain rate per week against the weekly sum payable for compensation, the workman cannot, after receiving the weekly sum payable under the award, contest the jurisdiction of the arbitrator to order the costs to be set off and deducted from the weekly payments. The award is entire, and the workman cannot contend that part of it is good and part bad.

2884.—Stroewer v. Aerogen Gas Co. (1913), 6 B. W. C. C. 576 ; [1913] W. C. & I. Rep. 578—C. A.

The employers paid a certain sum into court with respect to a claim for compensation, and submitted to an award of 7s. 6d. a week compensation. The workman refused to accept this, but the county court judge made an award in accordance with the employer's submission and ordered the costs to be deducted from the compensation, at 3s. a week. The workman received several weeks' compensation under this award, the costs being deducted each week, and then appealed on the grounds that the judge had no power to order the

costs to be deducted from compensation, and that rule 18 (7) of the Workmen's Compensation Rules, 1907—1912, was *ultra vires*.

HELD—that this was an attempt to approbate and reprobate the award, which was indivisible, and the appeal must be dismissed.

Notes.—*Johnson v. Newton Fire Extinguisher Co., Ltd.* [2883], followed.

VII. *Miscellaneous.*

2885.—*Goff v. Airds* (1912), 5 B. W. C. C. 277 ; [1912] W. C. Rep. 382—C. A.

A workman was injured, returned to work, and received for two years wages slightly less than his average weekly earnings before the accident. He then brought proceedings for compensation and voluntarily left his employers' service. The judge awarded full compensation as from the date he left work, but declined to give any compensation in respect of the difference of wages before that date, on the ground that the workman had accepted the wages in lieu of any compensation. The workman appealed.

HELD—there was no point of law taken by the workman, and the appeal failed.

2886.—*Payne v. Clifton* (1910), 3 B. W. C. C. 439—C. A.

There can be no appeal on a point of law which has not been taken in the court below.

See also *Smith v. Foster*, 6 B. W. C. C. 499 [2893].

2887.—*Kerr and Another v. Stewart* (1909), 43 Ir. L. T. 119—C. A. (Ir.)

Proceedings under the Workmen's Compensation Act, 1906, in respect of the death of a workman, were brought on behalf of A., a daughter, who had been residing with him and acting as his house-keeper, and B., his wife, who was then, and had been for many years, an inmate of the district lunatic asylum, and the matter was settled as between the employer and A., by the employer agreeing to pay £100, which was lodged in court, and (no guardian *ad litem* to B. having been appointed) an application was made by the resident medical superintendent of the asylum of which B. was an inmate to have the said sum of £100 apportioned between A. and B. on the basis of both of them being dependants of the deceased

HELD (on appeal)—that, as neither the employer nor B., the lunatic (no guardian *ad litem* having been appointed), was before the court, there was no jurisdiction to make any order, and the court accordingly made no rule.

2888.—*Coulson v. Worshipful Company of Drapers* (1911), 5 B. W. C. C. 136—C. A.

Where the parties, some of whom being infants, compromise a suit, the court will send the matter to the official solicitor for his consideration, and if he reports favourably, will allow the compromise.

2889.—Moffat v. Armstrong (1907), 41 Ir. L. T. 219—C. A. (Ir.)

On the hearing of an application under the Workmen's Compensation Act, 1897, the county court judge suggested that 2s. a week appeared to him to be a fair award. This suggestion was adopted by the parties, but the order was not made as a consent order. An appeal having been taken on the ground that the calculation of 2s. a week was grounded on an erroneous principle :

HELD—that as the county court judge's order was in the nature of a consent order the appeal could not be entertained.

2890.—Hodgson v. West Stanley Colliery Co. (No. 2) (1910), 3 B. W. C. C. 394—C. A.

An order of the House of Lords may be made an order of the Court of Appeal.

2891.—Practice Note, [1907] W. N. 245—C. A.

Cozens-Hardy, M.R., said he wished it to be clearly understood that in every appeal from a county court under the Workmen's Compensation Acts, three copies of the application to the county court and the answer must always be supplied for the use of the judges.

2892.—Barton v. Scott and Hodgson (1910), 4 B. W. C. C. 15—C. A.

The notice of appeal must state the grounds of appeal. If they are insufficiently stated the appeal will be dismissed.

SCHEDULE II., PARAGRAPHS (5) AND (6).

Medical Referee Sitting as Assessor.

Schedule II., paragraph (5).—A judge of county courts may, if he thinks fit, summon a medical referee to sit with him as an assessor.

[For procedure see Workmen's Compensation Rules, 1913, r. 55.]

2893.—**Smith v. Foster** (1913), 6 B. W. C. C. 499; [1913] W. C. & I. Rep. 420—C. A.

Upon a conflict of medical evidence given in an arbitration before a judge sitting with a medical assessor, the judge directed the medical assessor to examine the workman. The medical assessor communicated his opinion privately to the judge, who said that he adopted the view of the medical assessor and found in favour of the employers. No objection was taken on behalf of the workman to the examination.

HELD—there was no misdirection, and in any event, as no objection had been taken at the hearing, the point could not be taken on appeal.

Appearance of Parties in Arbitration.

Schedule II., paragraph (6).—Rules of court may make provision for the appearance in any arbitration under this Act of any party by some other person.

[See Workmen's Compensation Rules, 1913, r. 35.]

COSTS.

Schedule II., paragraph (7).—The costs of and incidental to the arbitration and proceedings connected therewith shall be in the discretion of the committee, arbitrator, or judge of the county court, subject as respects such judge and an arbitrator appointed by him to rules of court. The costs, whether before a committee or an arbitrator or in the county court, shall not exceed the limit prescribed by rules of court, and shall be taxed in manner prescribed by those rules and such taxation may be reviewed by the judge of the county court.

The costs of and incidental to the arbitration are in the discretion of the arbitrator, but he must exercise his discretion judicially. Thus there is no power to order costs against a successful respondent or applicant (*Evans v. Gwauncaegurwen Colliery Co., Ltd.* [2894]; *Jones v. Great Central Railway Co.* [2911]), although it is competent for the arbitrator to deal with the costs of separate issues (*Williams v. Caeponthren Colliery Co.* [2895], and other recent cases are also mentioned on this point). But the court will not interfere with the discretion of the arbitrator unless he violates some principle of law (*Nicholson v. Thomas* [2898], *Connor v. Meads* [2900], and other cases are illustrations of this proposition). The arbitrator has no power to award a lump sum as costs, for they must be taxed (*Beadle v. S.S. Nicholas (Owners)* [2904]), but if the costs are taxed at the termination of the hearing the lump sum at which they are taxed may be inserted in the award (*Gardner v. Cox* [2906]).

For procedure see Workmen's Compensation Rules, 1913, rules 76 to 81.

The cases are divided as follows :—

- I. Discretion of Arbitrator as to Costs.
- II. Lump Sum as Costs.

I. *Discretion of Arbitrator as to Costs.*

2894.—Evans v. Gwauncaegurwen Colliery Co., Ltd. (1912), 106 L. T. 613; 5 B. W. C. C. 441; [1912] W. C. Rep. 215—C. A.

An injured workman in receipt of full compensation was offered light work by his employers, and compensation was reduced from 19s. 7½*d.* to 5s. 6*d.* After a trial of a few weeks, the workman gave it up and claimed full compensation. The county court judge found that the workman was entitled to full wages for a month during the time he was only receiving 5s. 6*d.* and after that date he was entitled to 6s., being fit for light work. He, however, ordered him to pay the employers' costs, as he considered the workman had failed in the substantial point of proving he was totally incapacitated.

HELD—that the judge has no jurisdiction to make a successful applicant pay the whole of the respondent's costs; but *semble*, that the issues may be separated and costs of one set off against the other at the discretion of the judge.

2895.—Williams v. Caeponthren Colliery Co., [1913] W. C. & I. Rep. 155; 6 B. W. C. C. 122—C. A.

In their answer to an application for compensation the employers alleged that they had offered the workman light work and offered to submit to an award as from that date of 2s. 1½*d.* a week, being 50 per cent. of the difference between the amount he was earning before the accident and the amount he could earn at the light work, and they paid the arrears of compensation on that footing into court. The county court judge held that the workman ought to have accepted the light work, and awarded compensation at the rate of 2s. 10*d.* a week, with arrears at that rate, and ordered the workman to pay the employers' costs as from the date of the payment into court. The employers alleged that what happened at the hearing was that, a year having elapsed since the date of the accident, the county court judge arranged, with the consent of the parties, to deal on that application with the further question whether the workman, who was a minor, was entitled to an increase of compensation under Schedule I., clause (16), of the Workmen's Compensation Act, 1906, because he would by then have been earning an increased wage but for his injuries; and they said that the increase of the award from 2s. 1½*d.* to 2s. 10*d.* a week was accounted for in that way. This was denied by the workman, and if it was true the award had not been correctly drawn up.

HELD—that the case must be referred to the county court judge to make such order as to costs as he in his discretion and within the limits of his discretion should think fit; and that as the employers had failed to apply to have the award corrected, and had not protested against the appeal when they first received notice of it, they must bear the costs of the appeal.

Notes.—*Evans v. Gwauncaegurwen Colliery Co., Ltd.*, 106 L. T. 613 [2894], referred to.

See also *Jones v. Great Central Railway Co.* [2911].

2896.—Kierson v. Thompson & Sons, Ltd., [1913] 1 K. B. 587; 82 L. J. K. B. 920; [1913] W. C. & I. Rep. 140; 108 L. T. 236; 57 S. J. 226; 29 T. L. R. 205; 6 B. W. C. C. 58—C. A.

Assuming that a county court judge has jurisdiction as to the costs of an enquiry, under the Workmen's Compensation Act, 1906, Schedule II., clause (9) (*d*), as to recording a memorandum of an agreement for redemption of a weekly payment, he cannot order a successful party against whom no misconduct is proved to pay the costs of the other party.

2897.—Snell v. Gross Sherwood & Heald, Ltd. (1913), 6 B. W. C. C. 242; [1913] W. C. & I. Rep. 141—C. A.

A workgirl met with an accident and was paid compensation until the employers considered she had ceased to be incapacitated. They then offered her her old work, which she refused. The girl applied for compensation to be continued on the ground that she was still totally incapacitated. This was the only question in dispute. The county court judge found she was not incapacitated, but made a suspensory award of 1*d.* a week. He ordered the employers to pay the costs.

HELD—that it was not competent to make such order as to costs when the employers had been successful in the only issue raised.

2898.—Nicholson v. Thomas (1910), 3 B. W. C. C. 452—C. A.

An injured workman, in receipt of 1*s.* per week, applied for a review under Schedule I., paragraph (16), of the Workmen's Compensation Act, 1906. The employer denied liability, and in the alternative submitted to an award of 5*s.* weekly. After the opening of the case 5*s.* was unconditionally offered to the applicant and accepted. The county court judge held that the terms of the respondent's denial and submission were ambiguous, and therefore ordered the respondent to pay all the costs up to and including those of the hearing.

HELD—that the judge had exercised his discretion in the matter, and the Court would not interfere with his decision.

2899.—Lowestoft Corporation v. Aldridge (1912), 5 B. W. C. C. 329; [1912] W. C. Rep. 381—C. A.

The employers of an injured workman asked that an order should be made ending weekly payments unless the workman agreed to undergo an examination under an anæsthetic.

The county court judge held that the proper application would have been that the weekly payments should cease unless the workman consented to be examined properly and without obstruction on his part. He thus dismissed the application but refused to make any order as to costs, as he considered that the workman was solely responsible for the difficulty of examination.

HELD—that the question of costs was in the discretion of the county court judge.

2900.—Connor v. Meads (1912), 5 B. W. C. C. 435; [1912] W. C. Rep. 381—C. A.

The employers of an injured workman who was receiving 10s. a week as compensation applied, upon his obtaining work, to review and diminish to 2s. a week. The judge reduced the compensation to 7s. 6d. a week, and ordered the employers to pay the costs.

HELD—the judge had rightly exercised his discretion as to costs.

2901.—Thomas v. Cory Brothers, Ltd. (1911), 5 B. W. C. C. 5—C. A.

Employers stopped compensation on the ground that the workman had completely recovered. Upon the workman commencing proceedings the employers paid into court a sum which they admitted was due for certain weeks prior to the date of recovery, and which had not been paid through an oversight. The county court judge awarded the workman the sum paid into court, but ordered him to pay the employers' costs, finding that he had completely recovered at the date when the employers stopped compensation.

HELD—that the judge had jurisdiction so to order.

2902.—Cornish v. Lynch (1910), 3 B. W. C. C. 343—C. A.

An employer succeeded in having an award terminated, and had costs awarded to him. It was contended that, as the case was conducted by or in the interest of an insurance company, costs should not be awarded to him. The judge said that there was no evidence that the employer was not personally liable for costs, but if he was personally liable no doubt he was indemnified by the insurance company. On these facts the judge, in the exercise of his discretion, awarded costs to the employer.

HELD—that his discretion had been rightly exercised.

2903.—Rigby & Co v. Cox (No. 2), [1904] 2 K. B. 208; 73 L. J. K. B. 690; 91 L. T. 72; 68 J. P. 385; 20 T. L. R. 461—D.

An application under Schedule I., clause (12), of the Workmen's Compensation Act, 1897, to vary weekly payments of compensation is not necessarily, for the purposes of taxation of costs, to be treated either as an original or as an interlocutory matter.

The arbitrator has a discretion in each case under Schedule II., clause (6), and has no power to lay down any general rule as to how such applications are to be treated for the purposes of taxation.

See also *Sutton v. Great Northern Railway Co.* (No. 2) [2868]; *Jones v. Great Central Railway Co.* [2911]; *Smith v. Abbey Park Steam Laundry Co., Ltd* [2211].

II. *Lump Sum as Costs.*

2904.—Beadle v. S.S. Nicholas (Owners) (1909), 101 L. T. 586; 3 B. W. C. C. 102—C. A.

Having regard to the words "shall be taxed" in s. 7 of the Second Schedule to the Workmen's Compensation Act, 1906, the county

court judge has no jurisdiction to order payment of a lump sum as the costs of an arbitration under that Act; and the words of s. 4 of the same schedule, "where" the county court judge "makes any order under this Act," render such an order the subject of appeal to the Court of Appeal.

2905.—Welland v. Great Western Railway (1900), 16 T. L. R. 297; 2 W. C. C. 145—C. A.

Under the Workmen's Compensation Act, 1897, the arbitrator has jurisdiction to award a lump sum for costs instead of awarding costs to be taxed.

Notes.—This case is no longer an authority on this point; see *Beadle v. S.S. Nicholas (Owners)*, *supra*.

2906.—Gardner v. Cox (1910), 3 B. W. C. C. 245—C. A.

The proper officer of the court may tax the costs of an arbitration under the Workmen's Compensation Act, 1906, immediately at the termination of the hearing, and the lump sum at which they are taxed may be inserted in the award.

Appointment of New Arbitrator.

Schedule II., paragraph (8).—In the case of the death, or refusal or inability to act, of an arbitrator, the judge of the county court may, on the application of any party, appoint a new arbitrator.

[For procedure see Workmen's Compensation Rules, 1913, r. 42.]

RECORDING AGREEMENTS.

Schedule II., paragraphs (9) and (10).—(9) Where the amount of compensation under this Act has been ascertained, or any weekly payment varied, or any other matter decided under this Act, either by a committee or by an arbitrator or by agreement, a memorandum thereof shall be sent, in manner prescribed by rules of court, by the committee or arbitrator, or by any party interested, to the registrar of the county court who shall, subject to such rules, on being satisfied as to its genuineness, record such memorandum in a special register without fee, and thereupon the memorandum shall for all purposes be enforceable as a county court judgment.

Provided that—

- (a) no such memorandum shall be recorded before seven days after the despatch by the registrar of notice to the parties interested ; and
- (b) where a workman seeks to record a memorandum of agreement between his employer and himself for the payment of compensation under this Act and the employer, in accordance with rules of court, proves that the workman has in fact returned to work and is earning the same wages as he did before the accident, and objects to the recording of such memorandum, the memorandum shall only be recorded, if at all, on such terms as the judge of the county court, under the circumstances, may think just ; and
- (c) the judge of the county court may at any time rectify the register ; and
- (d) where it appears to the registrar of the county court, on any information which he considers sufficient, that an agreement as to the redemption of a weekly payment by a lump sum, or an agreement as to the amount of compensation payable to a person under any legal disability, or to dependants, ought not to be registered by reason of the inadequacy of the sum or amount, or by reason of the agreement having been obtained by fraud or undue influence, or other improper means, he may refuse to record the memorandum of the agreement sent to him for registration, and refer the matter to the judge who shall, in accordance with rules of court, make such order (including an order as to any sum already paid under the agreement) as under the circumstances he may think just ; and
- (e) the judge may, within six months after a memorandum of an agreement as to the redemption of a weekly payment by a lump sum, or of an agreement as to the amount of compensation payable to a person under any legal disability, or to dependants, has been recorded in the register, order that the record be removed from the register on proof to his

satisfaction that the agreement was obtained by fraud or undue influence or other improper means, and may make such order (including an order as to any sum already paid under the agreement) as under the circumstances he may think just.

(10) An agreement as to the redemption of a weekly payment by a lump sum if not registered in accordance with this Act shall not, nor shall the payment of the sum payable under the agreement, exempt the person by whom the weekly payment is payable from liability to continue to make that weekly payment, and an agreement as to the amount of compensation to be paid to a person under a legal disability or to dependants, if not so registered, shall not, nor shall the payment of the sum payable under the agreement, exempt the person by whom the compensation is payable from liability to pay compensation, unless, in either case, he proves that the failure to register was not due to any neglect or default on his part.

Recording Agreements.

The following scheme of arrangement has been adopted in considering the effect of paragraphs (9) and (10) of Schedule II. of the Act :—

Firstly, only the real agreement can be recorded. The memorandum of the agreement cannot be recorded unless it coincides with the real agreement made between the parties (*McLean v. Allan Line Steamship Co., Ltd.* [2907]; *M'Geown v. Workman, Clark & Co., Ltd.* [2908]). The agreement need not be in writing, and can be implied from the acts of the parties (*Jones v. Great Central Railway Co.* [2911]). But the arbitrator must not infer an agreement which the parties have not in fact made; thus, the mere fact that an employer has paid the workman compensation during periods of undoubted incapacity will not justify the court in coming to the conclusion that an agreement to do it for any future time has been come to (*Phillips v. Vickers, Sons and Maxim* [2912]; *Hartshorne v. Coppice Colliery Co.* [2913]; *Pryde v. A. G. Moore & Co.* [2914]; see also *Turner v. G. Bell and Sons, Ltd.* [2915]). If there is an agreement to pay compensation during total incapacity, such an agreement does not imply any agreement to pay during partial incapacity (*Maundrell v. Dunkeston Collieries Co., Ltd.* [2916]; *M'Carthy v. Stapleton-Bretherton* [2917]; see also *Pearson v. Babcock and Wilcox* [2918]). A memorandum of an oral agreement may be registered (*Cochrane v. Traill and Sons* (No. 3) [2919]).

Secondly, the agreement must be "genuine." "The word 'genuine' in itself implies not merely an agreement, which in truth was made, but also that the agreement so made is one capable of being enforced as a county court judgment," *per* Cozens-Hardy, M.R., in *Popple v. Frodingham Iron and Steel Co.* [2920]. It was held in that case that the court will not direct a memorandum of agreement to be recorded if at the date of the application to register the total incapacity has ceased, for the agreement must be a subsisting one. The decision in *Popple v. Frodingham Iron and Steel Co.* is of the greatest importance, since it explains the decision in *Blake v. Midland Railway* [2921], which is incorrectly reported as having decided

that the workman was entitled to have the agreement recorded even though it was no longer applicable; see also *Smith v. Petrie* [2784]. The law in Scotland appears to be still uncertain on this point, for although the decisions of the Court of Session in *Niddrie and Benhar Coal Co., Ltd. v. Hanley* [2206], and *McEwan v. William Baird & Co.* [2989] are in harmony with the view taken in the Court of Appeal, the earlier decisions in *Cammick v. Glasgow Iron and Steel Co.* [2923], *Macdonald v. Fairfield Shipbuilding and Engineering Co.* [2924], and *Coakley v. Addie and Sons* [2954] indicate that, if the agreement was in fact made, the memorandum must be registered, although the employers may apply for a review of the weekly payments. If the parties to an unrecorded agreement submit the question of the workman's condition to a medical practitioner, they are bound by his report, and an application for recording the agreement will be barred (*McNaughton and Sinclair v. Cunningham* [2925]).

Thirdly, return to work after agreement recorded. If a workman, who has been receiving compensation under a recorded agreement, returns to work, he cannot claim full compensation under the recorded agreement, for a suspension or a reduction of payments will be implied from his returning to work, although the memorandum of agreement will not be superseded (*Beath and Keay v. Ness* [2926]; *Nammo & Co., Ltd. v. Fisher* [2927]; *Baird v. M'Whinnie* [2928]). But the courts may refuse to grant a suspension where no manifest injustice arises from the refusal (*Fife Coal Co., Ltd. v. Lindsay* [2929]). If there is an agreement to do light work at the workman's former rate of wages, and that in the event of total incapacity recurring his rights under the Act should revive, such agreement will be terminated on the recurrence of total incapacity and a claim for compensation therefor, and will not afterwards revive (*Branford v. North Eastern Railway Co.* [2930]). Where the employer, in accordance with paragraph (9), proviso (b), proves that the workman returned to work at higher wages than those earned before the accident, the arbitrator may grant a conditional memorandum only (*Matthews v. Baird* [2931]).

Fourthly, powers of judge on reference by registrar. Where the registrar, acting under paragraph (9) (d), thinks that an agreement as to the redemption of a weekly payment by a lump sum ought not to be registered by reason of the inadequacy of the amount, and refers the matter to the judge, the latter cannot determine what sum ought to be paid, but can only decide whether the agreed sum is adequate or not (*Mortimer v. Secretan* [2932]). He cannot thus alter the amount and treat the agreement as a submission by the employer to pay any sum that the judge may think reasonable (*Halls v. Furness, Withy & Co.* [2933]), unless it is clearly mentioned in the award that the parties consent to such a proceeding (see also *M'Guire v. Paterson & Co.* [2934]). The judge is bound to determine whether the sum is adequate or not (*Ship Segura (Owners) v. Blampied*) [2935]. If the judge refuses to record a memorandum on the ground of inadequacy, the parties are relegated to their original rights under the Act (*Beech v. Bradford Corporation* [2936]); but see *O'Neill v. Anglo-American Oil Co., Ltd.* [2937]). If on an application to register a memorandum it is alleged that the agree-

ment has been discharged, the arbitrator must determine the validity of the alleged discharge before ordering the memorandum to be recorded (*Niddrie and Benhar Coal Co., Ltd. v. Hanley* [2206]), and he must also consider grounds of objection founded on alleged inadequacy of compensation or improper means by which the agreement was obtained (*Burns v. William Baird* [2938]). Where an application by the workman for the recording of an agreement and an application by the employer for a review come before the arbitrator at the same time, he may hear both applications simultaneously, or he may allow the memorandum to be registered and grant a stay of execution until the employer's application has been heard (*McEwan v. Baird* [2939]; *M'Vey v. Dixon* [2940]; see also *Wilsons and Clyde Coal Co., Ltd. v. Cairnduff* [2941]).

Fifthly, execution. Execution cannot issue until the party who is liable under the agreement has made default (*Ibrahim Said v. J. H. Welsford & Co., Ltd.* [2942]; see also rules 82 to 84, Workmen's Compensation Rules, 1913). The memorandum, when registered, is enforceable by judgment summons and committal order under s. 5 of the Debtors Act, 1869 (*Bailey v. Plant* (No. 1) [2943]), and an award of compensation may itself be registered as a memorandum and enforced in the same way (*Bailey v. Plant* (No. 2) [2944]). But if the employer raises the question whether total incapacity has ceased, that being a question which goes to the root of the matter, the registrar cannot direct execution to issue (*Warren v. Roxburgh* [2945]). It would appear that there may be execution on a recorded agreement as amended by an unrecorded agreement reducing the payments (*Fife Coal Co. v. Davidson* [2946]). It has been held in Scotland that there will be no suspension of a charge for payment under a recorded agreement in respect of the period since the recording, but as regards the period prior to the recording, a proof will be allowed if it is averred that the respondent has acquiesced in either the variation or the discontinuance of compensation as provided by the agreement, and if the averment is proved, the charge will be suspended (*Lochgelly Iron and Coal Co. v. Sinclair* (No. 3) [2947]; *Finnie v. Fulton* [2948]).

Sixthly, rectifying register and removal from register. "The judge may rectify the register at any time so as to make the registered memorandum of an agreement accord with the actual facts and the agreement entered into between the parties. The removal of a memorandum of an agreement may only be obtained within six months after it has been recorded and then only on the grounds of 'fraud or undue influence or other improper means'" (*per* Cozens-Hardy, M.R., in *Schofield v. Clough* (No. 2) [2949]). Where an agreement has in fact been made, the judge has no power to rectify such agreement on the ground that it was entered into by one of the parties on a mistaken assumption (*Schofield v. Clough* (No. 1) [2950]), and the matter cannot be gone into for the purpose of ascertaining whether the agreement which was entered into was simply an agreement in words and not an agreement in law (*Masterman v. Ropner* [2951]; see also *Baird v. Stevenson* [2952]).

Seventhly, appeal from order as to registration. An appeal from the order of a judge either granting or refusing to grant the registration of a memorandum of agreement lies to the Court of Appeal

(*Johnston v. Mew, Langton & Co.* [2953]). Under the old Act when the above case was decided an appeal went in the first instance to the Divisional Court, but now an appeal will lie under Schedule II., paragraph (4) direct to the Court of Appeal. In Scotland it has also been decided that the act of the sheriff in recording a memorandum of agreement, under the Act of 1906, is a judicial act and thus is subject to appeal by way of stated case (*Coakley v. Addie* [2954]; *Brown v. Orr* [2955]), but under the Act of 1897 it was held that there was no such appeal (*Binning v. Easton* [2956]).

Eightly, miscellaneous. It has been held by the Court of Session that an action to enforce an agreement to pay compensation under the Act is incompetent, for the only way to enforce such an agreement is to have a memorandum recorded (*Cochrane v. Traill* (No. 1) [2960]; *Lawrie v. Brown* [2961]). If a workman makes an application to record a memorandum of agreement the genuineness of which is disputed, he cannot commence arbitration proceedings until the application to record the memorandum has been determined (*King v. Arniston Coal Co., Ltd.* [2962]). There is no power under the Act to enforce an unrecorded agreement (*Colville v. Tighe* [2963]). As to agreements with infants, see *Rhodes v. Soothill Wood Colliery Co., Ltd.* [2743], and *Johnson v. Oceanic Steam Navigation Co.* [2744]. The payment of wages under a registered agreement will not estop the employers, on a claim by dependants, from showing that the death of the deceased workman was due to a disease, and not to the accident (*Cleverley v. Gas Light and Coke Co.* [2575]). An agreement entered into by an adult workman and his employer before any weekly payment has been made, by which the workman accepts a lump sum in satisfaction of all claims, need not be registered (*Ryan v. Hartley* [2964]).

For procedure see Workmen's Compensation Rules, 1913, rr. 43—52.

The cases are divided as follows :—

- I. Only Real Agreement can be Recorded.
- II. Agreement must be "Genuine."
- III. Return to Work after Agreement Recorded.
- IV. Powers of Judge on Reference by Registrar.
- V. Execution.
- VI. Rectifying Register and Removal from Register.
- VII. Appeal from Order as to Registration.
- VIII. Miscellaneous.

I. *Only Real Agreement can be Recorded.*

2907.—McLean v. Allan Line Steamship Co., Ltd., [1912] S. C. 256 ; 49 Sc. L. R. 207 ; 5 B. W. C. C. 527 ; [1912] W. C. Rep. 37—Ct. of Sess.

The employers of an injured workman agreed to pay him compensation during total incapacity, the agreement providing, *inter alia*, "the amount of any payment due during partial disablement to be settled hereafter." The workman sent for recording a memorandum providing that the compensation was to continue "during the claimant's incapacity for work, or until such time as the same shall be ended, diminished, or redeemed in accordance with the provisions of the said Act." The employers having objected on the ground that the form proposed to be recorded contained terms to which they had not agreed, the sheriff-substitute refused to record.

HELD—that the sheriff-substitute had rightly refused to record the memorandum tendered in respect that it did not in fact correctly set out the agreement made between the parties.

Notes.—*Per* the Lord President : "I think it comes to this, that where an agreement which has been come to between the parties is admittedly in writing, the sheriff must record that agreement as it stands, and nothing else. It is otherwise if the agreement has been come to verbally and is then disputed ; the sheriff has in that case to decide on a proof what the true verbal agreement was. But where the agreement is professedly in writing, I think his duty begins and ends in recording that agreement and that agreement only."

See note to *Pearson v. Babcock and Wilcox* [2918].

2908.—M'Geown v. Workman, Clark & Co., Ltd. (1911), 45 Ir. L. T. 165—C. A. (Ir.)

A workman applied to have a memorandum of agreement recorded, and it appeared that the memorandum included certain terms as to which there was no evidence of any agreement having been arrived at.

HELD—that the memorandum could not be recorded.

2909.—Shore v. S.S. Hyrcania (Owners) (1911), 4 B. W. C. C. 207—C. A.

Under Schedule II., paragraph (9), of the Workmen's Compensation Act, 1906, a county court judge has no power to record a memorandum of an agreement different from that in fact made between the parties.

2910.—Lunt v. Sutton Heath and Lee Green Collieries, Ltd. (1911), 4 B. W. C. C. 219—C. A.

The county court judge ordered the recording of a memorandum submitted by the workman, which was different in terms to the agreement made by the employer.

HELD—that the county court judge had power only to record a memorandum of the agreement in fact made between the parties.

2911.—*Jones v. Great Central Railway Co.* (1901), 18 T. L. R. 65 ; 4 W. C. C. 23—C. A.

An agreement settling a question under the Act may be implied.

A memorandum of an implied agreement may be registered.

The fact that a request for arbitration has been filed is no ground for refusing to register a memorandum of agreement.

Where an effective agreement between the parties subsists, a question does not arise within the meaning of s. 1, sub-s. 3, upon one party making a capricious claim against the other.

To found jurisdiction in arbitration, a question must have arisen before the request for arbitration.

There is no jurisdiction to make a successful respondent pay the costs of the applicant.

Notes.—*Field v. Longden and Sons* [2197] applied. As to the question of costs, *Foster v. Great Western Railway Co.*, 8 Q. B. D. 515, and *Dicks v. Yates*, 18 C. D. 76, followed.

2912.—*Phillips v. Vickers, Sons and Maxim*, [1912] 1 K. B. 16 ; 81 L. J. K. B. 123 ; 105 L. T. 564 ; 5 B. W. C. C. 23 ; [1912] W. C. Rep.—C. A.

On August 10th, 1909, a workman met with an accident, and his employers intimated that they would pay him half his weekly wages on production every fortnight of a certificate from the medical man attached to the works that he was still totally disabled. More than a year afterwards the man failed to produce this certificate, and in January, 1911, applied, under Schedule II., paragraph (9), of the Workmen's Compensation Act, 1906, to have a memorandum of agreement between his employers and himself registered, by which the employers agreed to pay him the amount of half his weekly wages "every week from the date of the accident." The county court judge ordered the agreement to be registered.

HELD—that there was no evidence from which an agreement such as the workman applied to have registered could be inferred, the only agreement being to pay him so long as he produced the above-mentioned certificate from the medical man, and therefore the registration must be vacated.

Notes.—*Per Fletcher Moulton, L.J.* : "I think it would be most disastrous to workmen if we were to hold that the mere fact that during periods of undoubted incapacity the employers paid the full compensation without driving the workmen to legal proceedings was to be taken as evidence that they had agreed to pay that compensation for any period of time or that they had agreed to the registration of an agreement under the Act that they would pay it during the disability. The effect of such a decision would be that employers would not be willing to pay compensation during the time that they were satisfied that there was incapacity, and workmen would be driven to proceed to law. The mere fact that an

employer pays when he feels that compensation is clearly due does not, in my opinion, justify the court in coming to the conclusion that an agreement to do it for any future time has been come to." *Jones v. Great Central Railway Co.* [2911] referred to.

2913.—Hartshorne v. Coppice Colliery Co. (1912), 106 L. T. 609 ; 5 B. W. C. C. 358 ; [1912] W. C. Rep. 255—C. A.

The mere payment by an employer of a weekly payment by way of compensation to a workman who has been injured by accident arising out of and in the course of his employment, within the meaning of s. 1 of the Workmen's Compensation Act, 1906, does not suffice to establish that an agreement so to do has been come to a memorandum of which is capable of being recorded pursuant to Schedule II., paragraph (9), of the Act.

Notes.—Cozens-Hardy, M.R., said that he wished to adopt emphatically what Fletcher Moulton, L.J., said in *Phillips v. Vickers, Sons and Maxim* [2912]. *Jones v. Great Central Railway Co.* [2911] distinguished.

2914.—Pryde v. A. G. Moore & Co., [1913] S. C. 457 ; 50 Sc. L. R. 302 ; 6 B. W. C. C. 384 ; [1913] W. C. & I. Rep. 100—Ct. of Sess.

A workman, who had been totally incapacitated by accident, received weekly payments of 10s. from his employers, for which he granted receipts bearing that the payments were accepted "as the weekly compensation payable during the period of total incapacity for work as the result of the accident." He subsequently applied for warrant to record a memorandum which bore that the parties had agreed "that compensation be paid by" the employers to the workman "in terms of the Workmen's Compensation Act, at the rate of 10s. per week from" the date of the accident.

HELD—that the memorandum was not genuine, in respect of the omission of the qualification "during the period of total incapacity."

Notes.—*M'Lean v. Allan Line Steamship Co., Ltd.* [2907] ; *Phillips v. Vickers, Sons and Maxim* [2912] ; *Hartshorne v. Coppice Colliery Co.* [2913], followed. This case also decided a question as to the amount of compensation awardable (see [2695]). See also *Payne v. Fortescue* [2202].

2915.—Turner v. G. Bell & Sons, Ltd. (1910), 4 B. W. C. C. 63—C. A.

The workman was injured, and was paid compensation for twenty-one weeks. The employers then stopped payment and disputed liability of any kind (including even the occurrence of an accident), and arbitration proceedings brought by the workman terminated in their favour. Subsequently application was made by the workman to the same county court judge to have the implied agreement recorded. The judge refused on the ground that he had already found, as a fact, no personal injury by accident arising out of or in the course of his employment was caused to the workman on the date

alleged in the particulars, and that the payments were in the nature of a compassionate allowance, and that there was no agreement.

HELD—that these were findings of fact with which the court could not interfere.

2916.—Maundrell v. Dunkeston Collieries Co., Ltd. (1910), 4 B. W. C. C. 76—C. A.

A workman was injured, and paid full compensation.

Four weeks after the accident the workman left with the registrar a memorandum of an agreement.

The employers gave notice of objection on the ground that the memorandum provided for the payment of full compensation during total “or partial” incapacity, but no further steps were then taken, and the full payments were continued.

Eighteen months later the workman had partially recovered, and was given light work by the employers, who offered to continue the payments on the basis of partial incapacity; this offer being refused, the workman applied to have the agreement recorded. The county court judge held that the agreement was to pay full compensation during total incapacity, and refused to register unless the memorandum were altered by striking out the words “or partial,” and adding certain other words.

HELD—the real agreement between the parties was to pay full compensation during total incapacity. Such an agreement does not imply any agreement to pay the same during partial incapacity.

Notes.—*Whalley v. Queen Brick Co.* (1909), January 19th, C. A. (not reported), referred to.

2917.—M'Carthy v. Stapleton-Bretherton (1911), 4 B. W. C. C. 281—C. A.

An injured workman, whose wages had been 18s. per week, was told that he would be paid 9s. per week till he could do light work. He received this for a few weeks, and was then given light work. No further compensation being paid, he sent for record a memorandum of agreement to pay 9s. per week during total or partial incapacity. The employer objected, but the county court judge recorded the memorandum.

HELD—that there was no evidence of any agreement to pay during partial incapacity, and that therefore the memorandum ought not to have been recorded.

Notes.—*Maundrell v. Dunkeston Collieries Co., Ltd.* [2916], applied.

2918.—Pearson v. Babcock and Wilcox, [1913] S. C. 959; 50 Sc. L. R. 790; [1913] W. C. & I. Rep. 430—Ct. of Sess.

An injured workman and his employers verbally agreed that compensation should be paid to the former at the rate of 15s. 1d. per week. The workman thereafter signed a number of receipts, each of which bore to be for “weekly compensation to date under the Workmen's Compensation Act, 1906, under which I claim for personal

injury by accident sustained by me." Thereafter the employers objected to the recording of a memorandum which bore that the agreement was to pay compensation at the foresaid rate "until the same is ended, diminished, redeemed, or suspended in terms of" the Act, on the ground that the memorandum was not genuine because it differed in terms from the agreement, which contained no obligation as to future payments.

HELD—that the arbitrator who had granted warrant to record the memorandum was right in so doing in respect that the agreement was an agreement to pay compensation in terms of the Act and that this memorandum merely set forth those terms.

Notes.—*M'Lean v. Allan Line Steamship Co., Ltd.* [2907], distinguished. *Freeland v. Summerlee Iron Co.*, [1912] S. C. 1145, affirmed, [1913] S. C. 8 [2204], applied. The Lord President, in referring to *M'Lean's Case*, said: "I did not decide in that case anything contrary to the decision of the House of Lords in the case of *Summerlee Iron Co.* If I did, of course, I should have been deciding wrongly. I quite understand *Summerlee Iron Co.* to have decided this—that if the memorandum which the employer proposes to have recorded does not deal with the whole of the three points with which the Act deals, namely, the fact of liability, the amount to be paid, and the duration of liability to be fixed as the Act chooses to fix it under the procedure therein provided, if the memorandum tendered by the employer falls short in dealing with all those three points the workman is entitled to say: 'That memorandum is not good enough for me; I am entitled to go to arbitration.'"

2919.—*Cochrane v. Traill & Sons* (No. 3) (1901), 3 F. 1091; 38 Sc. L. R. 848—Ct. of Sess.

A sheriff may entertain a petition, under the Workmen's Compensation Act, 1897, for a special warrant to register a memorandum of an oral agreement, and where necessary allow a proof.

Notes.—*Per Lord Adam*: "All the Act requires—s. 8 of the Second Schedule—is, that where the amount of compensation shall have been ascertained, either by a committee, or by an arbiter, or by agreement, a memorandum thereof shall be sent by the committee, or arbiter, or any person interested, to the sheriff-clerk for registration. If the agreement itself had been required to be sent the case would have been different, because, of course, a verbal agreement could not be sent. But there is no difficulty in sending a memorandum of the terms of a verbal agreement." See also *Cochrane v. Traill & Sons* (No. 1) [2960].

II. Agreement must be "Genuine."

2920.—*Popple v. Frodingham Iron and Steel Co.*, [1912] 2 K. B. 141; 81 L. J. K. B. 769; 106 L. T. 703; 5 B. W. C. C. 394; [1912] W. C. Rep. 231—C. A.

Where an agreement has been entered into between an employer and a workman who has been injured by an accident arising out of

and in the course of his employment for the payment of weekly compensation from the date of the accident and to continue during total incapacity for work, the court will not direct a memorandum of the agreement to be recorded if at the date of the application to register the total incapacity has ceased.

Notes.—*Per* Cozens-Hardy, M.R.: “The word ‘genuine’ in itself implies not merely an agreement which in truth was made, but also that the agreement so made is one capable of being enforced as a county court judgment. If so, it is plain that the registrar must be satisfied that the agreement is a subsisting agreement in this sense, that either at the moment when application to record is made there is, or at some future date there may be, ground for applying to the county court to enforce the memorandum as a judgment.” The Master of the Rolls pointed out that *Blake v. Midland Railway Co.* [2921] was “clearly distinguishable because there the agreement was, as appears from the report in the Law Times (90 L. T. 433), for payment during ‘total or partial incapacity.’” The decision in *Coakley v. Addie* [2954] was explained and disapproved in so far as it conflicts with the general principles laid down in this case, but the Master of the Rolls said, “I am not satisfied that there is anything in *Coakley’s Case*, when properly considered, which is necessarily inconsistent with the opinion I have expressed.” The later decisions of the Court of Session in *Hanley v. Niddrie and Benhar Coal Co., Ltd.* [1910] S. C. 875 [2206], and *McEwan v. William Baird & Co.* [2939] were approved. *Charing Cross Railway v. Boots*, [1909] 2 K. B. 640 [2805], referred to. With regard to the decision in *Blake v. Midland Railway Co.* [2921], Buckley, L.J., was of opinion that it could be supported on the peculiar facts of the case, and said: “From the report in 90 L. T. 433 there appears that which does not appear from the report in the Law Reports, that the agreement was one to pay during the total or partial incapacity of the workman, and the decision was only that so long as incapacity subsisted it was no objection to recording the agreement that since its date circumstances had altered and the amount payable in respect of compensation might properly be readjusted by way of diminution. The agreement was, and Wills, J., at p. 507, speaks of it as being, an existing agreement.” See also *Smith v. Petrie*, 50 Sc. L. R. 749 [2734].

2921.—*Blake v. Midland Railway Co.*, [1904] 1 K. B. 503; 73 L. J. K. B. 179; 90 L. T. 433; 68 J. P. 215; 20 T. L. R. 191—D.

There is no limit of time fixed by the Workmen’s Compensation Act, 1897, within which the parties may apply to register a memorandum of agreement for compensation under Schedule II., clause (8).

The genuineness of the memorandum of the agreement is not affected by the fact that at the date of the application to register the memorandum the agreement itself is, owing to altered circumstances, no longer applicable.

Notes.—This case does not appear to be correctly reported in the Law Reports. See the judgment of Buckley, L.J., in *Popple v. Frodingham Iron and Steel Co.* [2920].

2922.—*Keeling v. Eastwood & Co.* (1904), 116 L. T. J. 595; 6 W. C. C. 167—C. A.

A memorandum of an agreement should be registered although the agreement has been superseded by one of a subsequent date.

Notes.—This case is in effect overruled by *Popple v. Frodingham Iron and Steel Co.* [2920].

N.B.—The two following cases should be compared with the more recent Scottish decisions of *McEwan v. William Baird & Co., Ltd.* [2939] and *Niddrie and Benhar Coal Co. v. Hanley* [2206]. See the headnote to this paragraph, and also the notes to *Popple v. Frodingham Iron and Steel Co.* [2920].

2923.—*Cammick v. Glasgow Iron and Steel Co.* (1901), 4 F. 198; 39 Sc. L. R. 138—Ct. of Sess.

In an application to the sheriff for special warrant to register a memorandum of agreement under the Act, the applicant admitted that he had resumed work and was earning higher wages than before the accident, and that nothing was due to him in name of compensation at the date of the application; but he averred that in consequence of his injuries he was liable to be incapacitated for work from time to time, and he claimed to be entitled, in view of probable future claims against his employers, to have the memorandum registered. The employers admitted that they and the applicant had come to an agreement as to compensation under the Act, but claimed that the memorandum ought not to be registered, as the agreement was at an end owing to the applicant's recovery.

HELD—that the terms of the agreement being admitted, the memorandum should be registered, it being open to the employers to have their future liability fixed by applying for a review of the weekly payment under s. 12 of the First Schedule to the Act.

Notes.—See N. B. (*supra*). *Cochrane v. Traill & Sons* (No. 2) [2957], doubted.

2924.—*Macdonald v. Fairfield Shipbuilding and Engineering Co.* (1905), 8 F. 8; 43 Sc. L. R. 1—Ct. of Sess.

In answer to a petition by a workman for a special warrant to register a memorandum of a verbal agreement to pay compensation at the rate of 16s. a week under the Workmen's Compensation Act, 1897, the employers, while not denying the agreement, objected that it had been made under essential error as to the rights of the parties under the Act, and that the sum agreed to be paid was more than half the workman's average weekly earnings.

HELD—that the employers' objections were irrelevant as answers to the petition for warrant to register an agreement which was not denied.

OBSERVED—that in such a petition, once the alleged agreement is proved to have been in fact concluded, the functions of the sheriff-substitute are the same as those of the sheriff-clerk when the genuineness of the memorandum is not disputed.

Quere as to what is the proper course if a memorandum is presented proceeding upon a written agreement to pay a sum beyond the maximum amount which in any view of the facts could be awarded under the Act.

Notes.—See *N. B. (supra)*. See also *Lochgelly Iron and Coal Co. v. Sinclair* (No. 2), [1909] S. C. 922 [2217].

2925.—*Cunningham v. McNaughton and Sinclair*, [1910] S. C. 980 ; 47 Sc. L. R. 781 ; 3 B. W. C. C. 576, 577—Ct. of Sess.

An injured workman received compensation under the Workmen's Compensation Act, 1906, in virtue of an unrecorded agreement. The employers discontinued the weekly payments on the ground that the workman had recovered. A medical practitioner to whom the parties referred the question reported on March 31st, 1909, that he was quite fit for his former duties or any ordinary work. On August 12th, 1909, the workman lodged a memorandum of the agreement with the sheriff-clerk to be recorded, and the employers objected to the recording in respect of the medical report.

HELD—that the application for recording of the agreement was barred by the reference to the medical man and his award thereon, and that the memorandum ought not to be recorded.

Notes.—This case also decided a question arising under Schedule I., paragraph (1) (b) (see [2605]). *Hanley v. Niddrie and Benhar Coal Co., Ltd.*, [1910] S. C. 875 [2206], referred to.

III. *Return to Work after Agreement Recorded.*

2926.—*Beath and Keay v. Ness* (1903), 6 F. 168 ; 41 Sc. L. R. 113—Ct. of Sess.

A workman obtained a decree under the Workmen's Compensation Act, 1897, awarding him 17s. per week compensation "until further orders of the court." Thereafter he accepted employment with the same employers and was paid 34s. per week, being the same wages as before the accident, and continued to be so employed and paid for a considerable period, during which no payments under the decree were made, and no steps under the Act were taken by the employers to have the decree for weekly payments reviewed or terminated. Having left their employment, the workman sought to enforce the weekly payments decreed for from the date of the decree.

HELD—that the workman was not entitled to payment under the decree for the time he was earning full wages.

2927.—*Nimmo & Co., Ltd. v. Fisher*, [1907] S. C. 890 ; 44 Sc. L. R. 641—Ct. of Sess.

A workman, who had been receiving weekly compensation of 13s. 3d. under a recorded agreement, returned to work. The employers thereupon applied for a review, and the sheriff reduced the compensation to 1s. per week. The workman claimed for his

full compensation from the date from which it had ceased to be paid to the date of the sheriff's award. The employers offered to pay any deficiency, whenever such had occurred, between his actual earnings during the period and his average wage prior to the accident, and this offer being refused raised a suspension.

HELD—(1) that the workman had by returning to work admitted that total incapacity, the basis of the agreement, had ceased.

(2) That he could not therefore claim compensation as in respect of such incapacity.

(3) That the sheriff's award, not affecting the compensation due prior to its date, did not foreclose the question at issue; and

(4) That in respect of the employers' offer suspension should be granted.

Notes.—*Beath and Keay v. Ness* [2926] followed.

2928.—*Baird v. M'Whinnie*, [1908] S. C. 440; 45 Sc. L. R. 338; 1 B. W. C. C. 109—Ct. of Sess.

A workman, between July 13th, 1906, and September 13th, 1906, received weekly compensation at the rate 14s. 5d., being 50 per cent. of his average weekly earnings. A memorandum embodying this agreement was registered on July 21st, 1906. The workman returned to his work in the month of September following, and earned, until May, 1907, weekly wages averaging 23s. 2d. He then charged the employers on the registered agreement to pay him the whole arrears of the sum secured by the agreement, making no deduction for the wages earned during this time. The employers brought a suspension.

HELD, although the memorandum of agreement had not been superseded—that they were entitled to a suspension, as the payment and receipt of wages amounted either to an implied agreement to reduce the compensation assured by the registered memorandum, or as a satisfaction of such compensation.

Notes.—*Beath and Keay v. Ness* [2926] and *Nimmo & Co., Ltd. v. Fisher* [2927] followed. *Fife Coal Co., Ltd. v. Lindsay* [2929] distinguished.

2929.—*Fife Coal Co., Ltd. v. Lindsay*, [1908] S. C. 431; 45 Sc. L. R. 317; 1 B. W. C. C. 117—Ct. of Sess.

A workman who had been receiving compensation at the rate of 15s. 11d. a week by virtue of a memorandum of agreement duly registered in July, 1905, subsequently returned to work for the same employers, and received some wages and lesser compensation. In December, 1905, the employers had desired to further reduce the compensation, but this the workman would not agree to. He subsequently, in January, 1906, left the service (alleging that total incapacity for work had again supervened) and charged the employers with full compensation as from this date, basing his claim upon the recorded memorandum of July, 1905, which was the only agreement as to compensation which had been registered. The employers thereupon brought a suspension, and argued that the original agreement had been superseded by agreements to pay and accept the

lesser compensation. The court refused to suspend, as no manifest injustice arose from the refusal, on the ground that the complainers had a remedy under the statute which they had failed to take, viz., to apply when the final dispute as to reduction of compensation arose to the court for review of the weekly payments.

Notes.—*Beath and Keay v. Ness* [1926] and *Nimmo & Co., Ltd. v. Fisher* [1927] distinguished on the ground (*per* Lord Ardwell) that in both those cases “the workman endeavoured to go back over a past period and to obtain more compensation than he could possibly be entitled to on a sound construction of the Act had the ordinary proceedings under the Act been adopted.” *Hughes v. Thistle Chemical Co.* [1958] referred to.

2930.—*Branford v. North Eastern Railway Co.* (1910), 4 B. W. C. C. 84—C. A.

A workman, having been in receipt of full compensation for some months, entered into an agreement with his old employers to do light work at his former rate of wages, and that in the event of total incapacity recurring his rights under the Act should revive. He again became totally incapacitated, and claimed compensation, which was paid. He was subsequently offered light employment at reduced wages, with half the difference between his former and present wages. This offer he refused, claiming that, according to the terms of the agreement, he was entitled to full wages. The employers maintained that the agreement terminated when the subsequent claim for compensation was made, and that the workman was relegated to his rights under the Act. The county court judge upheld the contention of the employers.

HELD—that the agreement terminated on the recurrence of total incapacity and the claim for compensation being made and did not afterwards revive.

2931.—*Matthews v. Baird*, [1910] S. C. 689; 47 Sc. L. R. 627; 3 B. W. C. C. 566—Ct. of Sess.

In an application by a workman for warrant to record a memorandum of agreement for the payment of compensation during total incapacity, which was opposed by the employers, it was proved that the workman had returned to work at wages higher than those earned before the accident; that on several occasions he was reprimanded for laziness, and was ultimately dismissed on a reduction of the staff which took place a few weeks after his resumption of work; that since his dismissal he had earned no wages and was earning none at the date of the application, although no incapacity had supervened. The workman contended that he was entitled to have the warrant recorded *de plano*, as at the time of the application he was not in fact earning the same wages as before the accident, and that therefore sub-s. (b) of s. 9 of Schedule II. of the Workmen's Compensation Act, 1906, did not apply. The sheriff, holding that the employers had discharged the *onus* of proof imposed upon them by sub-s. (b), applied that sub-section and granted a conditional warrant only.

HELD—that the decision of the sheriff was justified.

IV. *Powers of Judge on Reference by Registrar.*

2932.—Mortimer v. Secretan, [1909] 2 K. B. 77 ; 78 L. J. K. B. 521 ; 100 L. T. 721—C. A.

Where the registrar, acting under the provisions of the Workmen's Compensation Act, 1906, Schedule II. (9) (d), thinks that an agreement as to the redemption of a weekly payment by a lump sum ought not to be registered by reason of the inadequacy of the amount, and refers the matter to the county court judge, the latter has no jurisdiction under the concluding words of sub-clause (d) to assess the amount which he considers adequate so as in fact to force a new agreement upon the parties, but can only decide, aye or no, whether the agreed sum is adequate or inadequate, with such incidental relief as he may under the circumstances think just.

2933.—Halls v. Furness, Withy & Co. (1909), 3 B. W. C. C. 72—C. A.

On an application to register a memorandum of agreement to pay compensation the judge has no power to alter the amount and to treat that agreement as a submission by the employer to pay any sum the judge may think reasonable.

Seemle, such jurisdiction may be given by consent, but the consent must be clearly so expressed and should be mentioned in the award.

Notes.—*Mortimer v. Secretan*, [1909] 2 K. B. 77 [2932], followed.

2934.—M'Guire v. Paterson & Co., [1913] S. C. 400 ; [1913] W. C. & I. Rep. 107 ; 6 B. W. C. C. 370—Ct. of Sess.

The Second Schedule, clause 9 (d), of the Workmen's Compensation Act, 1906, provides that a sheriff-clerk [registrar] to whom a memorandum of agreement for the redemption of a claim for compensation by payment of a lump sum is brought may refuse to record it if, "on any information which he considers sufficient," it appears to him that by reason of the inadequacy of the sum or the means by which the agreement was obtained, the agreement should not be recorded.

HELD—that the sheriff-clerk is not bound in every case *ex proprio motu* to enquire into these matters before proceeding to record.

Observations on the duties of the sheriff-clerk in such a case.

Notes.—This case is also inserted on another point under s. 1, sub-s. 3 (sec [2225]). *Mortimer v. Secretan* [2932] referred to.

2935.—Ship Segura (Owners) v. Blampied (1911), 4 B. W. C. C. 192—C. A.

An agreement for the redemption of a weekly payment by a lump sum was sent to a registrar to record. It appearing inadequate, the registrar referred it to the county court judge. The judge, holding that the sole question for him to decide was whether the agreement had in fact been made, declined to decide the question of adequacy.

HELD—that the case must go back for the question of adequacy to be decided.

2936.—*Beech v. Bradford Corporation* (1911), 4 B. W. C. C. 236—C. A.

A county court judge refused to record a memorandum of agreement for a lump sum settlement, on the ground of inadequacy. The workman then applied for compensation, and the judge, finding that his incapacity was no longer due to the accident, and that the amount in fact paid under the abortive settlement was enough to cover all compensation due for the short period during which the incapacity had been due to the accident, awarded in favour of the employers.

HELD—that, on the refusal to record, the parties were relegated to their previous rights unprejudiced, and that the judge was entitled to decide the application for compensation freely on the evidence, not being bound, by his previous decision, to award for the workman.

2937.—*O'Neill v. Anglo-American Oil Co., Ltd.* (1909), 2 B. W. C. C. 434—C. A.

A workman in receipt of maximum compensation of 17*s.* 3*d.* per week agreed with his employers to receive the sum of £175 to redeem the liability. The workman was proved to have so far recovered as to be able to do some light work. The judge refused to allow the agreement to be registered, being (apparently) of opinion that it was not a proper sum for the redemption of a permanent payment of 17*s.* 3*d.* per week.

HELD—the said decision must be overruled, as the judge had, in assuming that 17*s.* 3*d.* was a permanent payment which the employer was under an obligation to pay, misdirected himself, and the memorandum sent for registration must be recorded.

2938.—*Burns v. William Baird & Co.*, [1913] W. C. & I. Rep. 61; (1912) 2 S. L. T. 491; 6 B. W. C. C. 362—Ct. of Sess.

A workman objected to the recording of a memorandum of agreement on the ground that it was not genuine, in respect that the payment had not been accepted by him in full satisfaction and discharge of all claims past and future in respect of the accident, and further that the amount was inadequate, and though the agreement was in fact made, yet it was made owing to misrepresentation on the part of the employers. The sheriff-clerk, without himself raising the question of adequacy, referred the objection to the sheriff-substitute as arbitrator, who decided the agreement was genuine, and that he could not deal with the inadequacy or the misrepresentation.

HELD—that it was competent for the sheriff-substitute to consider the grounds of objection founded on alleged inadequacy of compensation and improper means by which the agreement was obtained.

Notes.—*Macdonald v. Fairfield Shipbuilding Co.* [2924] discussed. In his judgment Lord Salvesen referred to the cases of *Ellis v.*

Lochgelly Iron and Coal Co. [2205]; *Brown v. Orr* [2955]; *Hanley v. Niddrie and Benhar Coal Co.* [2206], and *Macandrew v. Gilhooley* [2221], and said "all these cases, although decided on different sections of the Workmen's Compensation Act or its schedules, tend to support the conclusion that questions, whether of fact or law, arising with regard to disputed claims for compensation must be determined in the first instance by the arbitrator."

2939.—*M'Ewan v. William Baird & Co., Ltd.*, [1910] S. C. 436; 47 Sc. L. R. 430—Ct. of Sess.

2940.—*M'Vey v. Dixon*, [1910] S. C. 544; 47 Sc. L. R. 463—Ct. of Sess.

Where an application by a workman for the recording of an agreement fixing compensation and an application by his employer to have the compensation ended or diminished came before the sheriff at the same time, the sheriff allowed a proof in the application for review. The workman having moved for a warrant to record the memorandum in respect that its genuineness was not disputed and that no other question of fact arose, the sheriff refused the motion and allowed a proof to proceed on the same day as the proof in the application for review. On appeal:

HELD—that the sheriff was not bound to grant warrant to register the memorandum of agreement without awaiting the result of the proof in the application for review.

Opinion (*per* the Lord President) that the arbitrator might also have sisted the application to register until the determination of the application to vary, or, though not so conveniently, might have registered the memorandum but superseded extract until such time as there was a determination in the application to vary and/or end.

Notes.—In the case of *M'Ewan v. Baird*, Lord Johnston delivered a dissentient judgment, and Lord Kinnear expressed the opinion that "an agreement to pay compensation which introduces conditions other than those contained in the statute cannot be recorded under s. 9 of the Second Schedule to the Workmen's Compensation Act, 1906." *Finnie v. Fulton* [2948]; *Donaldson Brothers v. Cowan*, [1909] S. C. 1292 [2810]; *Upper Forest and Western Steel and Tinplate Co., Ltd. v. Thomas*, [1909] 2 K. B. 631 [2804], and *Charing Cross, Euston and Hampstead Railway Co. v. Boots*, [1909] 2 K. B. 640 [2805], discussed and applied. After referring to the two last-mentioned cases the Lord President said. "They show, I think, conclusively that the English courts proceed thus: Where the county court judge is applied to at one and the same time to register a memorandum and to vary a payment, their plan is to allow the memorandum to be registered, but to grant a stay of execution in order that the other matter may be taken up, and then according as the decision in the other matter is one way or another, that stay of execution is either removed or not, as the case may be."

2941.—Wilsons and Clyde Coal Co., Ltd. v. Cairnduff ; Cadzow Coal Co. v. M'Aleer ; Robert Addie & Sons' Collieries, Ltd. v. Coakley, [1911] S. C. 647 ; 48 Sc. L. R. 500—Ct. of Sess.

Opinion, that when a memorandum has been recorded in terms of the Workmen's Compensation Act, 1906, the only method by which the employer can relieve himself of the liability imposed on him by that memorandum is by an application for review under Schedule I., paragraph (16), of the Act ; but observed, that, if a workman charges under a recorded memorandum for a sum which has already been paid to him by the employer, a suspension at the instance of the employer would be competent.

Notes.—This case was decided on a point arising under the Sheriff Courts (Scotland) Act, 1907, but the Lord President considered that he ought to express the above opinion on the merits of the case.

M'Ewan v. William Baird & Co., Ltd. [2939] followed.

See also *Niddrie and Benhar Coal Co., Ltd. v. Hanley* [2200] ; and *Swannick v. Congested Districts Board for Ireland (Trustees)* [2822].

V. *Execution.*

2942.—Ibrahim Said v. J. H. Welsford & Co., Ltd. (1910), 3 B. W. C.C. 233—C. A.

Employers ceased weekly payments under a recorded agreement to pay compensation during incapacity. Thereupon the workman applied in the county court for leave to issue execution. The employers, who appeared, tendered evidence to show that the workman was no longer incapacitated at the date when the payment ceased. This evidence was held to be inadmissible, and leave was granted to the workman to issue execution.

HELD—that the evidence tendered was admissible to show that there had been no default.

Quære, whether such an application for leave to issue execution can be made *ex parte*.

Notes.—*Per* Cozens-Hardy, M.R. : “ I am quite clear that a judgment in this form does not entitle the plaintiff to obtain execution unless he proves default, and if he is bound to prove default, the other side ought certainly to have a right to be heard.”

2943.—Bailey v. Plant (No. 1), [1901] 1 K. B. 31 ; 70 L. J. K. B. 63 ; 83 L. T. 459 ; 49 W. R. 103 ; 65 J. P. 52 ; 17 T. L. R. 48—C. A.

Where an amount of compensation under the Workmen's Compensation Act, 1897, has been ascertained under the Act by an arbitrator, and a memorandum thereof has been recorded under clause (8) of Schedule II. of the Act, the memorandum is enforceable by judgment summons and committal order under s. 5 of the Debtors Act, 1869.

Notes.—*Ex parte Dakins*, 16 C. B. 77, referred to.

2944.—Bailey v. Plant (No. 2) (1901), 17 T. L. R. 449; 3 W. C. C. 207—Div. Ct.

An award of compensation under the Workmen's Compensation Act, 1897, may itself be registered as a memorandum under Schedule II., clause (8), to the Act, so as to be enforceable as a county court judgment by a commitment order under the Debtors Act, 1869.

2945.—Warren v. Roxburgh (1912), 106 L. T. 555; 5 B. W. C. C. 263; [1912] W. C. Rep. 306—C. A.

Where a memorandum of an agreement has been recorded by the registrar of a county court, pursuant to Schedule II., paragraph (9) of the Workmen's Compensation Act, 1906, whereby compensation to a workman is made payable by his employer so long as his total incapacity for work shall last, it may be right to apply to the registrar to enforce that agreement as a county court judgment; but if the employer raises the question whether total incapacity has ceased, that being a question which goes to the root of the matter, the registrar cannot direct execution to issue. If, on the other hand, it is admitted by the employer that the total incapacity continues, then on that admission there is his duty to pay compensation which will be enforced by execution.

2946.—Fife Coal Co., Ltd. v. Davidson, [1907] S. C. 90; 44 Sc. L. R. 108—Ct. of Sess.

A workman who was in receipt of compensation under a recorded verbal agreement, having partially recovered, subsequently entered into another verbal agreement, which was not recorded, whereby he agreed to accept a smaller sum. His employers having subsequently refused to pay the reduced amount the workman charged for payment thereof. The charge proceeded on the recorded agreement, but it also narrated the unrecorded agreement, and the sum charged for was the reduced sum.

HELD—that the charge was good inasmuch as (1) the recorded agreement was not displaced as a ground of charge by the subsequent unrecorded agreement; and (2) it was competent to restrict the amount charged for to a sum less than that in the agreement founded on.

2947.—The Lochgelly Iron and Coal Co., Ltd. v. Sinclair (No. 3), [1909] S. C. 922; 46 Sc. L. R. 665—Ct. of Sess.

2948.—Finnie & Sons v. Fulton, [1909] S. C. 938; 46 Sc. L. R. 665—Ct. of Sess.

Apart from such special cases as that of a workman admitting actual payment of compensation or the receipt of full wages from the same employer, the court will not suspend a charge, proceeding upon a recorded memorandum of agreement, so far as relating to the period subsequent to the date of the granting of the warrant to record the memorandum; while, so far as relating to the period

prior to the granting of the warrant, it will not suspend *simpliciter*, but as regards that period will allow a proof if the complainer relevantly avers that the respondent has acquiesced in either the variation or the discontinuance of compensation, and if the averment is proved will suspend.

Opinion reserved (*per* Lord President) as to whether there could be a "review" in the sense of Schedule I., s. 16, of an unrecorded agreement.

Notes.—The Lord President in his judgment referred to the cases of *Cochran v. Traill & Sons* (No. 1) [2960] and *Cochran v. Traill & Sons* (No. 3) [2919], as deciding that a memorandum of a verbal agreement could be registered, and the cases of *Cammick v. Glasgow Iron and Steel Co.* [2923]; *Dunlop v. Rankin*, 4 F. 203 [2215], and *Baird v. Stevenson* [2952], as deciding that such a memorandum could be registered at any time, *i.e.*, no matter how long after the accident, and incidentally that it was an irrelevant objection to registration that the workman had long ago completely recovered. The opinion of the Lord President on this point is not in harmony with the decision of the Court of Appeal in *Popple v. Frodingham Iron and Steel Co.* [2920], and the later Scottish decisions in *Hanley v. Niddrie and Benhar Coal Co., Ltd.* [1910] S. C. 875 [2206], and *M'Ewan v. William Baird & Co., Ltd.* [1910] S. C. 436 [2939]. The Lord President commented upon the opinions of Lord Adam and Lord M'Laren in *Jamieson v. Fife Coal Co., Ltd.*, 5 F. 958 [2704], and contrasted the decision in *Dunlop v. Rankin*, *supra*, with those opinions. The Lord President and Lord Salvesen dissented from the rule laid down in *Steel v. Oakbank Oil Co., Ltd.*, 5 F. 244 [2811], and *Pumpherson Oil Co. v. Cavaney*, 5 F. 963 [2812], that a finding in an arbitration putting an end to weekly payments takes effect only from its date and not from the date of the application, and approved of the rule laid down in *Morton v. Woodward*, [1902] 2 K. B. 276 [2803]. *Fife Coal Co. v. Lindsay* [2929]; *Nimmo & Co., Ltd. v. Fisher* [2927], referred to. In England if an attempt was made to record a memorandum under circumstances similar to the above, the court would refuse the registration on the ground that the memorandum was no longer in force (see *Popple v. Frodingham Iron and Steel Co.* [2920]). See also note to *Nelson v. Summerlee Iron Co.* [2801].

VI. Rectifying Register and Removal from Register.

2949.—*Schofield v. W. C. Clough & Co.* (No. 2), [1913] 2 K. B. 103; 82 L. J. K. B. 447; [1913] W. C. & I. Rep. 292; 108 L. T. 532; 57 S. J. 243; 6 B. W. C. C. 66—C. A.

In arbitration proceedings under the Workmen's Compensation Act, 1906, there is no jurisdiction to remove from the register, kept under Schedule II., clause 9, of the Act, a memorandum of agreement which correctly states the terms of the agreement entered into between the parties, unless the application to remove it is made under Schedule II., clause 9 (*e*), within six months of its being recorded, and it is proved to the satisfaction of the arbitrator that the agree-

ment was obtained by "fraud or undue influence or other improper means."

Notes.—In his judgment Cozens-Hardy, M.R., said: "A distinction has been drawn between rectifying and removing. The judge may rectify at any time so as to make the registered memorandum of an agreement accord with the actual facts and the agreement entered into between the parties. . . . The removal of a memorandum of agreement can only be obtained within six months after it has been recorded, and then only on the grounds of 'fraud or undue influence or other improper means.' These are all out of the question here. The only thing alleged in this case is mistake. That may be a ground for getting the agreement set aside under the general jurisdiction of the court, but we are here dealing with a special and peculiar jurisdiction conferred by statute on the judge of the county court, and there is no presumption that he is to have any general jurisdiction in the matter, or any powers beyond those to be found in the Act." *Rex v. Templer, Ex parte Howarth*, [1912] 2 K. B. 444 [2836], referred to.

2950.—*Schofield v. W. C. Clough & Co.* (No. 1) (1912), 5 B. W. C. C. 417; [1912] W. C. Rep. 301—C. A.

A mill hand, who was born on February 9th, 1889, met with an accident on February 8th, 1910. Compensation at the rate of full wages, 8s. 2d. a week, was paid her, and a memorandum of the agreement to pay her 8s. 2d. during total incapacity was recorded on the assumption that she was an infant. The employers then applied to have the register rectified on the ground that the proper compensation should be 4s. 1d. half wages, the woman really being of full age at the time. The county court judge found she was of full age and granted the application.

HELD—that there was no jurisdiction to rectify in this case.

Notes.—*Per* Cozens-Hardy, M.R.: "If the employers agree to pay her 4s. 1d., and the woman's advisers agree to the alteration, then she might be well advised to consent to the rectification. But without consent the order of the judge is *ultra vires*, and this appeal succeeds."

2951.—*Masterman v. Ropner & Sons, Ltd.* (1909), 127 L. T. J. 8—C. A.

When a memorandum has been declared to be a genuine memorandum and duly recorded as such—which is not a mere ministerial and administrative act—the matters between the parties are finally determined, and therefore on a subsequent application for rectification of the register they cannot, in the absence of mutual mistake or fraud, be gone into for the purpose of ascertaining whether the agreement which was entered into was simply an agreement in words and not an agreement in law.

Notes.—*Blake v. Midland Railway* [1921]; *Cammick v. Glasgow Iron and Steel Co.* [1923], discussed.

2952.—Baird v. Stevenson, [1907] S. C. 1259; 44 Sc. L. R. 864—Ct. of Sess.

The power given by paragraph (8) of the Second Schedule to the Workmen's Compensation Act, 1897, to "rectify" the special register appointed to be kept for the registration of memorandums of agreement, does not empower the expunging of a memorandum of agreement between an employer and a workman on the ground that at the date when the memorandum was recorded the workman had completely recovered and was earning on an average as much wages as he did before the accident.

Notes.—This case also decided a question as to review of weekly payments, but is no longer good law on this point (see [2813]). *Binning v. Easton & Sons* [2956] referred to.

VII. *Appeal from Order as to Registration.*

2953.—Johnston v. Mew, Langton & Co. (1907), 98 L. T. 517; 24 T. L. R. 175; 1 B. W. C. C. 133—C. A.

In proceedings under the Workmen's Compensation Act, 1897, where there is a dispute as to the genuineness of a memorandum of agreement with regard to the amount of compensation payable to the workman, and the matter is referred by the registrar to the judge, if the latter hears evidence and as a result orders the memorandum to be recorded he is acting in a judicial capacity, and consequently an appeal will lie from his decision under s. 120 of the County Courts Act, 1888.

Notes.—The appeal in this case went in the first instance to the Divisional Court, but now an appeal would lie under Schedule II. (4) direct to the Court of Appeal. *Binning v. Easton & Sons* [2956] dissented from.

2954.—Coakley v. Addie & Sons, Ltd., [1909] S. C. 545; 46 Sc. L. R. 408; 2 B. W. C. C. 437—Ct. of Sess.

In a case where the recording of a memorandum was objected to on the ground that it was not genuine:

HELD—that the decision of the sheriff as to whether it should or should not be recorded was a decision *qua* arbitrator and not merely a ministerial act, and was accordingly subject to appeal by way of stated case.

By an agreement between a workman and his employers the latter bound themselves to pay a weekly sum as compensation under the Act "during his total incapacity for work." The workman having sought to have a memorandum recorded at a time when he was no longer incapacitated, his employers, while not disputing that the memorandum correctly represented the contract between themselves and the workman, contended that in view of the fact that he was not incapacitated it was not "genuine" in the sense of the statute.

HELD—that the agreement was "genuine" and must be recorded.

Notes.—*Binning v. Easton & Sons* [2956], and the analogous

provisions of the Workmen's Compensation Act, 1897, and relative Act of Sederunt, distinguished. Lord Low, in referring to the ground of judgment in *Binning v. Easton & Sons*, said: "It seems to me to be plain that no such course of reasoning is possible under the Act of Sederunt now in force."

2955.—*Brown v. Orr*, [1910] S. C. 526; 47 Sc. L. R. 437—Ct. of Sess.

The act of the sheriff in recording a memorandum of agreement under the Workmen's Compensation Act, 1906, is a judicial act, and thus, where a question of law is involved the provisions for appeal by way of stated case contained in the statute apply, and the common law remedies are consequently excluded.

Notes.—*Coakley v. Addie & Sons, Ltd.* [2954] followed. *Binning v. Easton & Sons* [2956] referred to.

2956.—*Binning v. Easton & Sons* (1906), 8 F. 407; 43 Sc. L. R. 312—Ct. of Sess.

2957.—*Cochrane v. Traill & Sons* (No. 2) (1900), 3 F. 27; 38 Sc. L. R. 18—Ct. of Sess.

2958.—*Hughes v. The Thistle Chemical Co.*, [1907] S. C. 607; 44 Sc. L. R. 476—Ct. of Sess.

2959.—*Lochgelly Coal and Iron Co. v. Sinclair* (No. 1), [1907] S. C. 3—Ct. of Sess.

The granting or refusing to grant a warrant by a sheriff (whose functions correspond to those of a county court judge) authorising the registration of a memorandum of an agreement whose genuineness has been disputed, is a ministerial act and cannot be appealed from.

Notes.—The decisions in these four cases are no longer applicable under the present Act. See the note to *Coakley v. Addie* [2954].

VIII. *Miscellaneous.*

2960.—*Cochrane v. Traill & Sons* (No. 1) (1900), 2 F. 794; 37 Sc. L. R. 662—Ct. of Sess.

An action to enforce an agreement to pay compensation under the Workmen's Compensation Act is incompetent.

Per the Lord Justice-Clerk and Lord Low: "An agreement to pay compensation under the Workmen's Compensation Act, 1897, though not in writing, may be enforced under the Act by lodging a memorandum of agreement and getting the authority of the sheriff to register it in terms of the Act; and this may be done although six months from the date of the accident have elapsed."

Notes.—*Dalrymple v. Herdman* (1878), 5 R. 847; *Hislop v. MacRitchie's Trustees*, 8 R. (H. L.) 95, referred to.

2961.—*Lawrie v. Brown & Co.*, [1908] S. C. 705; 45 Sc. L. R. 707; 1 B. W. C. C. 137—Ct. of Sess.

A memorandum of agreement, registered under paragraph (8) of Schedule II. of the Workmen's Compensation Act, 1897, bore to be "in the matter of an agreement under the Workmen's Compensation Act, 1897," between L. and B. & Co., and it set forth that L. had claimed compensation under the Act from B. & Co.; that the parties were agreed that the maximum compensation to which L. was entitled was 17s. 6d.; and that B. & Co. "agree in lieu of such compensation to give L. regular employment as a foreman" and "to pay him the fixed weekly wage of 23s. . . . and also to pay him on the date hereof 90l. sterling, and these in full of all his claims for compensation under the said Act." B. & Co. paid £90 to L., and they also employed him on the agreed-on terms for about three years. They then dismissed him. L. brought an action claiming damages from B. & Co. for breach of agreement, pleading that the memorandum of agreement embodied two agreements—(a) an agreement to pay £90 as compensation under the Act, and (b) a common law agreement to give the pursuer employment.

HELD—that the action was incompetent in respect that the agreement being indivisible and being recorded, only the remedies provided by the Workmen's Compensation Act were available to L.

Notes.—*Robertson v. Henderson & Son, Ltd.*, 7 F. 776, referred to.

2962.—*King v. Arniston Coal Co., Ltd.*, [1913] S. C. 892; 5 Sc. L. R. 685; [1913] W. C. & I. Rep. 388—Ct. of Sess.

A workman made an application to record a memorandum of agreement. The genuineness of the memorandum was disputed by the employers. While the application was pending the workman initiated arbitration proceedings to obtain an award for compensation under the Act.

HELD—that the arbitration proceedings could not be commenced until the application to record the memorandum had been determined.

Notes.—*Per* the Lord Justice-Clerk: "There are two modes under the Workmen's Compensation Act by which a man may obtain compensation. If there is an agreement between him and his employers he may get that agreement recorded. By the other mode, where there is no agreement, there is a process by which the facts are ascertained, and the sheriff then gives his judgment upon them and awards compensation if he thinks it is due. These two modes seem to me to be absolutely inconsistent with one another, and if either party is to maintain that there is an agreement, his opponent is entitled to be free from any other process until that is decided; because the question of an agreement is a question which must be decided before you can proceed logically to discuss the question whether there is liability or not."

2963.—*Colville v. Tigue* (1905), 8 F. 179 ; 43 Sc. L. R. 129—Ct. of Sess.

In August, 1903, the employers, who admitted their liability to pay compensation under the Act to A., one of their workmen, agreed to pay him at the rate of 12s. 5d. a week “during the period of his incapacity.” The agreement was not recorded under the Act. The employers made payments in terms of the agreement down to December 14th, 1903. They then ceased to make payments, alleging that A.’s incapacity had ceased, and offering him work at full wages, which he declined. In March, 1905, A. instituted arbitration proceedings, in which he asked for an order that the employers should pay him compensation under the Act at the rate of 12s. 5d. a week as from December 14th, 1903, until further orders of the court. The sheriff, as arbitrator, found that A.’s incapacity had ceased by December 14th, 1903, but ordered the employers to make payment to A. at the rate of 12s. 5d. a week as from December 14th, 1903, to July 12th, 1905—the date of the award ; and held that the employers were not liable for any future compensation. In an appeal by the employers :

HELD—that the sheriff, as arbitrator, had wrongly awarded compensation as from December 14th, 1903, to the date of his award in respect that—first, if A.’s application for compensation was made under the agreement, the sheriff, as arbitrator, had under the Act no power to enforce the agreement as to arrears of compensation due under it ; and secondly, if the application was for the purpose of settling compensation by arbitration, A. was not entitled to the compensation awarded, the sheriff having found in fact that A.’s incapacity had ceased by December 14th, 1903

Quære, whether an unrecorded agreement to pay compensation under the Act remains in force until formally terminated or modified in terms of the Act.

Semble (*per* Lord Low), that it does not.

Notes.—*Steel v. Oakbank Oil Co., Ltd.*, 5 F. 244 [2811] ; *Jamieson v. Fife Coal Co., Ltd.*, 5 F. 958 [2704] ; *Pumpherstons Oil Co., Ltd. v. Cavaney*, 5 F. 963 [2812] ; and *Strannigan v. Baird & Co., Ltd.*, 6 F. 784 [2209], commented upon.

2964.—*Ryan v. Hartley*, [1912] 2 K. B. 150 ; 81 L. J. K. B. 666 ; 106 L. T. 702 ; 5 B. W. C. C. 407 ; [1912] W. C. Rep. 236—C. A.

There is nothing in the Workmen’s Compensation Act, 1906, to prevent an adult workman before entering a claim for an award and before any payment of a weekly sum has been made to him from coming to an arrangement by way of compromise with his employer to accept a lump sum in satisfaction of all claims in respect of an injury occasioned by an accident which has happened to him whilst in the employer’s service, and such agreement, if entered into, will be valid although not registered under the Act.

Paragraph (10) of Schedule II. presupposes that a weekly payment has been made which but for the existence of the agreement to pay a lump sum would have continued, and has no application to a case where no weekly payment has ever in fact been made.

SCHEDULE II., PARAGRAPHS (11) TO (18).

County Court Districts.

Schedule II., paragraph (11).—Where any matter under this Act is to be done in a county court, or by, to, or before the judge or registrar of a county court, then, unless the contrary intention appear, the same shall, subject to rules of court, be done in, or by, to, or before the judge or registrar of the county court of the district in which all the parties concerned reside, or if they reside in different districts the district prescribed by rules of court, without prejudice to any transfer in manner provided by rules of court.

[For procedure see Workmen's Compensation Rules, 1914, which annul and re-enact rules 89—91 of the W. C. Rules, 1913.]

2965.—*Rex v. Owen*, [1902] 2 K. B. 436 ; 71 L. J. K. B. 770 ; 87 L. T. 298 ; 51 W. R. 168 ; 18 T. L. R. 701 ; 4 W. C. C. 150—Div. Ct.

Where a workman resident in England is engaged by an employer resident in Scotland, and during the engagement meets with an accident in England, the judge of the county court within whose district the accident happens has jurisdiction under the Second Schedule, paragraph (9), of the Workmen's Compensation Act, 1897, to hear an arbitration for the settlement under the Act of the compensation due to the workman.

Notes.—*Per* Lord Alverstone, C.J. : “I am clearly of opinion that, where the parties are resident in different districts in the United Kingdom, the court within the district of which the accident happened has jurisdiction, and the procedure as to service of proceedings being effected by registered letter is applicable to the whole area which is within the ambit of the Act.”

2966.—*Haddock v. Fisher & Sons* (1900), *Times*, May 7th ; 4 W. C. C. 43—C. A.

Quære, whether a request for arbitration can be served without leave out of the jurisdiction.

Notes.—In this case the question was raised whether an English county court had jurisdiction, when the accident happened within the local jurisdiction, and the applicant resided within that jurisdiction, but the employers resided in Ireland. The point was not decided, as it was ordered by consent that the case should be tried within the local jurisdiction.

Duty of County Court Judge and Rules of Court.

Schedule II., paragraph (12).—The duty of a judge of county courts under this Act, or in England of an arbitrator appointed by him, shall, subject to rules of court, be part of the duties of the county court, and the officers of the court shall act accordingly, and rules of court may be made both for any purpose for which this Act authorises rules of court to be made, and also generally for carrying into effect this Act so far as it affects the county court, or an arbitrator appointed by the judge of the county court, and proceedings in the county court or before any such arbitrator, and such rules may, in England, be made by the five judges of county courts appointed for the making of rules under section one hundred and sixty-four of the County Courts Act, 1888, and when allowed by the Lord Chancellor, as provided by that section, shall have full effect without any further consent.

[All arbitrations in the county court are now governed by the Consolidated Workmen's Compensation Rules, July, 1913.]

Court Fees.

Schedule II., paragraph (13).—No court fee, except such as may be prescribed under paragraph (15) of the First Schedule to this Act, shall be payable by any party in respect of any proceedings by or against a workman under this Act in the court prior to the award.

[For the Treasury Order dated May 30th, 1907, regulating fees in county courts under the Act, see Yearly County Court Practice, 1914, pp. 902 and 1002.]

Payment of Compensation and Recovery of Costs from Successful Applicant.

Schedule II., paragraph (14).—Any sum awarded as compensation shall, unless paid into court under this Act, be paid on the receipt of the person to whom it is payable under any agreement or award,

and the solicitor or agent of a person claiming compensation under this Act shall not be entitled to recover from him any costs in respect of any proceedings in an arbitration under this Act, or to claim a lien in respect of such costs on, or deduct such costs from, the sum awarded or agreed as compensation, except such sum as may be awarded by the committee, the arbitrator, or the judge of the county court, on an application made either by the person claiming compensation, or by his solicitor or agent, to determine the amount of costs to be paid to the solicitor or agent, such sum to be awarded subject to taxation and to the scale of costs prescribed by rules of court.

[This paragraph only deals with the costs which the solicitor is able to recover from a successful applicant over and above the costs which he is entitled to be paid by the respondents. The latter are dealt with in paragraph (7) of Schedule II. As regards payment into court, see paragraphs (5) and (7) of Schedule I. For procedure see Workmen's Compensation Rules, 1913, rr. 80, 81.]

Submission to Medical Referee.

Schedule II., paragraph (15).—Any committee, arbitrator, or judge may, subject to regulations made by the Secretary of State and the Treasury, submit to a medical referee for report any matter which seems material to any question arising in the arbitration.

[For procedure see Workmen's Compensation Rules, 1913, r. 98.]

2967.—*Jackson v. Scotstoun Estate Co.*, [1911] S. C. 564; 48 Sc. L. R. 440; 4 B. W. C. C. 381—Ct. of Sess.

An arbitrator who has referred a question to a medical referee for a report under Schedule II., paragraph (15), of the Workmen's Compensation Act, 1906, is not bound to accept the medical referee's report as conclusive of the question which he, the arbitrator, has to decide.

Notes.—In his judgment the Lord President said: "While I therefore think that your Lordships cannot interfere with the finding to which the sheriff has come, I must express my great difficulty in penetrating the sheriff's mind in the procedure he has taken here. To state, first, that you have conflicting evidence, and therefore, in order to help yourself, to take expert advice upon that conflicting evidence, then so to frame your question as really to put the whole determination of the fact to the medical expert; and then, having received from him a report upon that evidence (to help your mind, which is supposed to be oscillating) that the result is 'A.,' without

more ado to find that the result is 'B.,' is, to my mind, a very curious mental process. But the arbitrator is entitled to have curious mental processes, if there is any evidence upon which they can be supported. I cannot say there is none here."

2968.—*Quinn v. Flynn* (1910), 44 Ir. L. T. 183 ; 3 B. W. C. C. 594—C. A. (Ir.).

Where a county court judge, under Schedule II., paragraph (15), of the Workmen's Compensation Act, 1906, submits to a medical referee for report any matter which seems material to any question arising in the arbitration, the judge is not bound by the referee's report, but should exercise an independent judgment.

2969.—*Dowds v. Bennie* (1902), 5 F. 268 ; 40 Sc. L. R. 239—Ct. of Sess.

2970.—*Niddrie and Benhar Coal Co., Ltd. v. M'Kay* (1903), 5 F. 1121—Ct. of Sess.

Semble, the report of a medical referee made under rule 2 of the regulations as to the appointment, etc., of medical referees of May 2nd, 1898, is not to be taken by the arbitrator as final and conclusive, but falls to be considered by him along with the other evidence before him.

Notes.—The case of *Dowds v. Bennie* is also inserted on another point dealing with the refusal of the workman to submit to treatment (see [2633]). The case of *Niddrie and Benhar Coal Co., Ltd. v. M'Kay* also decided a point as to the obligation of the workman to submit himself to a medical referee under the old Act which is no longer of importance under the present Act ; see Schedule I., paragraph (15). *Davidson v. Summerlee and Mossend Iron and Steel Co., Ltd.*, 5 F. 991 [2210], questioned.

2971.—*Johnstone v. Cochrane & Co.* (1904), 6 F. 854 ; 41 Sc. L. R. 644—Ct. of Sess.

In an application by an employer under s. 12 of Schedule I. of the Workmen's Compensation Act, 1897, for review and ending of a weekly payment made under agreement, in respect that the workman had recovered and had been certified as recovered by a medical practitioner selected by the employer, the workman moved to be allowed to call evidence ; but the sheriff refused this application, and remitted to a medical practitioner appointed by the Secretary of State, and thereafter, on a consideration of his report, terminated the weekly payment.

HELD—that the sheriff was not entitled to refuse the application of the workman to be allowed to call evidence, and that the case must be sent back to him for this application to be granted.

Notes.—*Niddrie and Benhar Coal Co., Ltd. v. M'Kay* [2970] applied.

2972.—*Gray v. Carroll*, [1910] S. C. 700 ; 47 Sc. L. R. 646 ; 3 B. W. C. C. 572—Ct. of Sess.

A remit by an arbitrator to a medical referee for a report cannot competently be made unless the arbitrator has taken evidence regarding the matter remitted for report.

2973.—*Carolan v. Harrington*, [1911] 2 K. B. 733 ; 80 L. J. K. B. 1153 ; 105 L. T. 271 ; 27 T. L. R. 486 ; 4 B. W. C. C. 253—C. A.

The jurisdiction of any committee, arbitrator, or judge, under the Workmen's Compensation Act, 1906, Schedule II., paragraph (15), to submit to a medical referee for report any matter arising in the arbitration may be exercised notwithstanding that the workman in respect of whom the claim is brought is dead.

Notes.—It was argued for the appellant in this case that the only jurisdiction to submit any question to a medical referee is where the workman is alive, the argument being based on the fact that the regulations as to medical referees made by the Secretary of State and the Treasury, and the Workmen's Compensation Rules and the Forms all presuppose that the medical referee may see the man himself and examine him. In reference to this argument Cozens-Hardy, M.R., said : " If there are no regulations and no rules which fit the case, then it seems to me that the power of the judge to submit the case to a medical referee is not in any way fettered by the rules and regulations. . . . I decline to curtail the jurisdiction in that way, and I base my decision upon the plain language of paragraph (15)."

2974.—*Hendricksen v. S.S. Swanhilda (Owners)* (1911), 4 B. W. C. C. 233—C. A.

A seaman was injured, and claimed compensation. The medical evidence being conflicting, the county court judge referred the matter to a medical referee, under Schedule II., paragraph (15), of the Workmen's Compensation Act, 1906. He reported that the man was fit for light work on land with a truss. On this report the county court judge awarded compensation on the basis of total incapacity.

HELD—that the judge was entitled under the regulations so to refer the matter to a referee, and on the latter's report was entitled to make the award.

Powers of Committees.

Schedule II., paragraph (16).—The Secretary of State may, by order, either unconditionally or subject to such conditions or modifications as he may think fit, confer on any committee representative

of an employer and his workmen, as respects any matter in which the committee act as arbitrators, or which is settled by agreement submitted to and approved by the committee, all or any of the powers conferred by this Act exclusively on county courts or judges of county courts, and may by the order provide how and to whom the compensation money is to be paid in cases where, but for the order, the money would be required to be paid into court, and the order may exclude from the operation of provisoes (d) and (e) of paragraph (9) of this Schedule agreements submitted to and approved by the committee, and may contain such incidental, consequential, or supplemental provisions as may appear to the Secretary of State to be necessary or proper for the purposes of the order.

[An order of the Secretary of State, dated June 25th, 1907, has been made under this paragraph, conferring powers on a committee representative of the Durham Colliery Owners' Mutual Protection Association and Durham Miners' Association.]

Application to Scotland.

Schedule II., paragraph (17).—In the application of this Schedule to Scotland—

- (a) "County court judgment" as used in paragraph (9) of this Schedule means a recorded decree arbitral;
- (b) Any application to the sheriff as arbitrator shall be heard, tried, and determined summarily in the manner provided by section fifty-two of the Sheriff Courts (Scotland) Act, 1876, save only that parties may be represented by any person authorised in writing to appear for them and subject to the declaration that it shall be competent to either party within the time and in accordance with the conditions prescribed by act of sederunt to require the sheriff to state a case on any question of law determined by him, and his decision thereon in such case may be submitted to either division of the Court of Session, who may hear and determine the same and remit to the sheriff with instruction as to the judgment to be pronounced, and an appeal shall lie from either of such divisions to the House of Lords;
- (c) Paragraphs (3), (4), and (8) shall not apply.

The cases are arranged as follows:

I. Appeal to House of Lords.

2975.—*Osborne v. Barclay, Curle & Co.*, [1901] A. C. 269; 85 L. T. 286—H. L. (Sc.). Reported in 38 Sc. L. R. *sub nom.* *M'Kinnon v. Barclay Curle & Co.*

By s. 14 (c) of the Second Schedule to the Workmen's Compensation Act, 1897, which applies to Scotland, "Any application to the

sheriff as arbitrator shall be heard, tried, and determined summarily in the manner provided by the fifty-second section of the Sheriff Courts (Scotland) Act, 1876, save only that parties may be represented by any person authorised in writing to appear for them, and subject to the declaration that it shall be competent to either party, within the time and in accordance with the conditions prescribed by act of sederunt, to require the sheriff to state a case on any question of law determined by him, and his decision thereon in such case may be submitted to either division of the Court of Session, who may hear and determine the same finally, and remit to the sheriff with instruction as to the judgment to be pronounced."

HELD—that in cases within this enactment no appeal lies to the House of Lords from a decision of the Court of Session.

Notes.—This decision is now no longer law, for an appeal in such a case is given by paragraph (17) of Schedule II. It is, however, submitted that there will still be no appeal from the Court of Session to the House of Lords in matters arising under the Act of 1897, *e.g.*, a review of an award made under the old Act. There have been several appeals under the Act of 1906 (see *Low or Jackson v. General Steam Fishing Co., Ltd.*, [1909] A. C. 523 [1957]; *Mackay v. Rosie* (No. 2), [1912] S. C. (H. L.) 7 [2559]).

II. *Stated Case.*

2976.—*Euman v. Dalziel & Co.* (No. 1), [1912] S. C. 966 ; 49 Sc. L. R. 693 ; [1912] W. C. Rep. 328—Ct. of Sess.

In an arbitration under the Workmen's Compensation Act, 1906, in which the sheriff-substitute, acting as arbitrator, had awarded compensation, the defenders craved a stated case for the opinion of the Court of Session on the following question of law, *viz.*, whether the death of the said Robert Euman was the result of an accident arising out of and in the course of his employment within the meaning of the Workmen's Compensation Act, 1906. The sheriff-substitute having refused the application, the defenders presented a note to the First Division for an order on the respondent to show cause why such a case should not be stated.

The court granted the order with the question of law framed as follows :—"Whether there was evidence upon which it could competently be found that the death of Robert Euman was the result of an accident arising out of and in the course of his employment."

Notes.—There was a second appeal in this case (see *Euman v. Dalziel & Co.* [2570]). *Blakey v. Robson, Eckford & Co., Ltd.*, [1912] S. C. 334 [2028] ; *Miller v. Refuge Assurance Co., Ltd.*, [1912] S. C. 37 [2037], applied.

2977.—*Park v. Coltness Iron Co.* (1913), 6 B. W. C. C. 892 ; 50 Sc. L. R. 926 ; [1913] W. C. & I. Rep. 725 ; [1913] 2 S. L. T. 232—Ct. of Sess.

In an arbitration under the Workmen's Compensation Act, 1906, the arbitrator, after hearing proof, refused compensation to an injured

workman on the ground that the employers were prejudiced by the workman's delay in giving notice of the accident. The workman having appealed by way of stated case, the Court of Session after consideration thereof remitted to the arbitrator to find whether notice of the accident had been given as soon as practicable. The arbitrator thereupon re-examined the doctor who had attended the workman during the illness caused by the accident, and thereafter reported to the Court of Session that notice must be held to have been given as soon as practicable. The workman having moved the court to dispose of the case on the stated case, and the arbitrator's report, the employers opposed the motion on the ground that the report was vitiated in respect that it proceeded upon evidence which had been led after the proof was closed.

HELD—that it was competent for the arbitrator to hear further proof.

Notes.—*Per* the Lord President : “ I think it is perfectly clear that the rules with regard to proof appended to the Sheriffs Courts Act are rules for regulating procedure in the ordinary court, and have no application to summary causes.”

2978.—*Nelson v. Allan Brothers & Co. (United Kingdom), Ltd.* (1913), 6 B. W. C. C. 853 ; [1913] W. C. & I. Rep. 532 ; [1913] 2 S. L. T. 147—Ct. of Sess.

The sheriff-substitute awarded against a workman on a series of facts found. The workman appealed, and asked that the sheriff-substitute should be ordered to state a case for the opinion of the court as to whether the evidence at the hearing did not support a series of facts as set out by the workman contrary to those found by the sheriff-substitute.

HELD—that there was no appeal on questions of fact.

2979.—*Paterson v. Beardmore & Co., Ltd.*, [1910] S. C. 507 ; 47 Sc. L. R. 455—Ct. of Sess.

A certificate of refusal to state a case for appeal under the Workmen's Compensation Act, 1906, must be written on a separate paper, and not merely on the interlocutor sheet in the arbitration process.

Application to Ireland.

Schedule II., paragraph (18).—In the application of this schedule to Ireland the expression “ judge of the county court ” shall include the recorder of any city or town, and an appeal shall lie from the Court of Appeal to the House of Lords.

THIRD SCHEDULE.

Description of Disease.	Description of Process.
Anthrax	Handling of wool, hair, bristles, hides, and skins.
Lead poisoning or its sequelæ .	Any process involving the use of lead or its preparations or compounds.
Mercury poisoning or its sequelæ.	Any process involving the use of mercury or its preparations or compounds.
Phosphorus poisoning or its sequelæ - - - - -	Any process involving the use of phosphorus or its preparations or compounds.
Arsenic poisoning or its sequelæ .	Any process involving the use of arsenic or its preparations or compounds.
Ankylostomiasis	Mining.

Where regulations or special rules made under any Act of Parliament for the protection of persons employed in any industry against the risk of contracting lead poisoning require some or all of the persons employed in certain processes specified in the regulations or special rules to be periodically examined by a certifying or other surgeon, then, in the application of this schedule to that industry, the expression "process" shall, unless the Secretary of State otherwise directs, include only the processes so specified.

[This schedule has been extended by orders of the Secretary of State dated May 22nd, 1907, and December 2nd, 1908. The extensions are included in the headnotes to s. 8. See sub tit. "Industrial Diseases."]

APPENDIX A.

EMPLOYER'S LIABILITY.

A. At Common Law.

A MASTER is liable to his servants for injuries received by them as such at common law quite apart from either the Employers' Liability Act, 1880, or the various Workmen's Compensation Acts. The common law liability, however, must be based on tort, generally the tort of negligence, but possibly the tort of nuisance. That is to say, the master is liable for injuries received by his servant due to the master's own negligence just as the master would be liable to any other person to whom he owed a duty to take care who was injured by his negligence, save that the master's liability to his servant is limited by the maxim "*Volenti non fit injuria*." Most of the cases which follow will be found to turn upon this maxim, particularly on that important application of it known as the rule in *Priestly v. Fowler* [2980], or the doctrine of common employment. For this rule to be duly comprehended the following elementary points must be fully appreciated : Firstly, a master is liable to third parties for torts committed by his servants in the course of their employment whether the tortious act was authorised or not or even forbidden. Secondly, a master is not liable to a servant for such a tort committed by a competent fellow-servant; for the servant injured cannot complain, he having (impliedly) consented to run the risk of his fellow-servant's negligence. Thirdly, the basis of the master's immunity in such a case is entirely consent, and such consent will also be implied where a person puts himself in the position of a fellow workman, though under no contract of service with the *quasi*-master (this we refer to as the principle of *quasi*-common employment). Fourthly, the master has no immunity save to the extent that the consent will be implied, and consent will not be implied, viz., to run the risk of the negligence of an *incompetent* fellow-servant. In such cases, therefore, the master is liable, *semble*, but only if he has been guilty of negligence in choosing such servant, but we question the logic of this limitation : a workman is regarded as impliedly consenting to run ordinary risks; the risk of the negligence of an incompetent fellow-servant (whom he does not know to be incompetent) is not an ordinary risk. The doctrine of common employment being based on the maxim "*volenti non fit injuria*" would not, therefore, seem to apply. If it does not apply the position is all one, as though the workman injured were a stranger; that is to say, the master is liable for the tort of the incompetent servant quite apart from his own negligence in originally employing such a person. Fifthly, granted no consent on the servant's part to run the risk,

the master is liable to the same extent as though the servant were a stranger to whom a duty to take reasonable care was owed and to no greater extent; so in such a case contributory negligence, *i.e.*, failure to take reasonable care to avoid the consequences of the original negligence is a defence. Sixthly, the master is only liable for negligence where the negligence is his personal negligence, save as before-mentioned. Finally, it must be remembered that by "consent" we mean "free consent," and this may be called the rule in *Smith v. Baker* [3075]; but consent within the maxim "*Volenti non fit injuria*" does not merely apply to an acquiescence in the risk of fellow-servants' negligence, but to all risks ordinarily incident to the service and known to be so at the time the service is entered into.

As regards the position of the dependants of a workman who is killed, they possessed no right of action at common law, the maxim "*Actio personalis moritur cum persona*" applying. This was, of course, altered by the Fatal Accidents (Lord Campbell's) Act, 1846, as amended by the Fatal Accidents Amendment Act, 1864.

The cases are divided up as follows:

I. The Doctrine of Common Employment.

- (1) Generally.
- (2) Master's Liability for Incompetent Servants.
- (3) Persons in Common Employment.
 - (a) Fellow Servants and Persons under same Control.
 - (b) Persons in *quasi* Common Employment.
- (4) Persons not in Common Employment.

II. Master's Duty to take Reasonable Care.

III. Servant's own Negligence or Knowledge of Danger.

I. *The Doctrine of Common Employment.*(1) *Generally.*

2980.—**Priestly v. Fowler** (1837), 3 M. & W. 1; M. & H. 305; 7 L. J. Ex. 42; 1 Jur. 987.

A master is not liable to an action, at the suit of his servant, for an injury sustained by the latter caused by the breaking down of a carriage in which the servant was riding on his master's business, through a defect in the carriage of which the master was not aware.

A declaration stated that the plaintiff was a servant of the defendant in his trade of a butcher; that the defendant desired and directed the plaintiff to go with and take goods of the defendant in a van of the defendant then used by him, and conducted by another of his servants, in carrying goods for him upon a certain journey; that the plaintiff, in pursuance of such desire and direction, accordingly commenced and was proceeding and being carried and conveyed by the van with the goods: and it became the defendant's duty to use proper care that the van should be in a proper state of repair, and should not be overloaded, and that the plaintiff should be safely and securely carried thereby; nevertheless, that the defendant did not use proper care that the van should not be overloaded, or that the plaintiff should be safely and securely carried, in consequence of the neglect of which duties the van gave way and broke down, and the plaintiff was thrown on the ground and his thigh fractured.

HELD—first, that it was sufficiently to be collected from the declaration that the defendant directed the plaintiff to go in the van; but, secondly, that, even in that case, the action was not maintainable.

Lord Abinger, C.B.: "This was a motion in arrest of judgment, after verdict for the plaintiff, upon the insufficiency of the declaration. [His Lordship stated the declaration.] It has been objected to this declaration, that it contains no premises from which the duty of the defendant, as therein alleged, can be inferred in law; or, in other words, that from the mere relation of master and servant no contract, and therefore no duty, can be implied on the part of the master to cause the servant to be safely and securely carried, or to make the master liable for damage to the servant, arising from any vice, or imperfection, unknown to the master, in the carriage, or in the mode of loading and conducting it. For, as the declaration contains no charge that the defendant knew any of the defects mentioned, the court is not called upon to decide how far such knowledge on his part of defect unknown to the servant, would make him liable.

It is admitted that there is no precedent for the present action by a servant against a master. We are therefore to decide the question upon general principles, and in doing so we are at liberty to look at the consequences of a decision the one way or the other.

If the master be liable to the servant in this action, the principle of that liability will be found to carry us to an alarming extent. H. who is responsible by his general duty, or by the terms of his contract, for all the consequences of negligence in a matter in which he is the principal, is responsible for negligence of all his inferior agents. If the owner of the carriage is therefore responsible for the sufficiency of his carriage to his servant, he is responsible for the negligence of

his coach-maker, or his harness maker, or his coachman. The footman, therefore, who rides behind the carriage, may have an action against his master for a defect in the carriage owing to the negligence of the coach-maker, or for a defect in the harness arising from the negligence of the harness maker, or for drunkenness, neglect, or want of skill in the coachman; nor is there any reason why the principle should not, if applicable in this class of cases, extend to many others. The master, for example, would be liable to the servant for the negligence of the chambermaid, for putting him into a damp bed; for that of the upholsterer, for sending in a crazy bedstead, whereby he was made to fall down while asleep and injure himself; for the negligence of the cook, in not properly cleaning the copper vessels used in the kitchen; of the butcher, in supplying the family with meat of a quality injurious to the health; of the builder, for a defect in the foundation of the house, whereby it fell, and injured both the master and the servant by the ruins.

The inconvenience, not to say the absurdity of these consequences, affords sufficient argument against the application of this principle to the present case. But, in truth, the mere relation of the master and the servant never can imply an obligation on the part of the master to take more care of the servant than he may reasonably be expected to do of himself. He is, no doubt, bound to provide for the safety of his servant in the course of his employment, to the best of his judgment, information and belief. The servant is not bound to risk his safety in the service of his master, and may, if he thinks fit, decline any service in which he reasonably apprehends injury to himself; and in most of the cases in which danger may be incurred, if not in all, he is just as likely to be acquainted with the probability and extent of it as the master. In that sort of employment, especially, which is described in the declaration in this case, the plaintiff must have known as well as his master, and probably better, whether the van was sufficient, whether it was overloaded, and whether it was likely to carry him safely. In fact, to allow this sort of action to prevail would be an encouragement to the servant to omit that diligence and caution which he is in duty bound to exercise on the behalf of his master, to protect him against the misconduct or negligence of others who serve him, and which diligence and caution while they protect the master, are a much better security against any injury the servant may sustain by the negligence of others engaged under the same master, than any recourse against his master for damages could possibly afford.

The judgment ought to be arrested."

Notes.—The doctrine does not apply as between fellow-workmen. See *Lees v. Dunkerley Brothers*, [1911] A. C. 5 [2384].

2981.—*David v. Britannic Merthyr Coal Co.*, 78 L. J. K. B. 659; [1909] 2 K. B. 146; 100 L. T. 678; 53 S. J. 398; 25 T. L. R. 431—C. A. Affirmed in H. L., *sub nom. Britannic Merthyr Coal Co. v. David*, 79 L. J. K. B. 153; [1910] A. C. 74; 101 L. T. 833; 54 S. J. 151; 26 T. L. R. 164; 47 Sc. L. R. 609—H. L. (E.).

The defendants were the owners of a mine in which an explosion

resulting in the death of several workmen occurred owing to the contravention by their fellow-workmen of statutory rules under the Coal Mines Regulation Act, 1887, s. 49. In an action by the widow of one of the deceased workmen to recover damages from the defendants for alleged breach of statutory duty, the judge directed the jury that the Act does not impose an absolute statutory duty upon the mine owner to insure compliance with the rules by his servants, and that it was for the plaintiff to give evidence that the defendants neglected their duty of enforcing the rules.

HELD (Cozens-Hardy, M.R., *diss.*)—that this was a misdirection, since s. 49 imposes on the mine owner the statutory duty of seeing that the rules are complied with, for the breach of which an action for damages lies. The doctrine of common employment affords no defence in such a case where injury has been caused to a servant by the breach of a statutory duty imposed on the master.

Groves v. Wimborne (Lord), [1898] 2 Q. B. 402; 67 L. J. Q. B. 862, followed. *Howells v. Landore Siemens Steel Co.*, 44 L. J. Q. B. 25; L. R. 10 Q. B. 62 [3019], considered.

Per Fletcher Moulton, L.J.: Sect. 50 of the same Act applies to criminal proceedings only. *Per* Buckley, L.J.: Sect. 50 applies to civil as well as criminal proceedings.

HELD (on appeal)—that the jury had been misdirected in being told that, unless they were of opinion that there was evidence that the owner had connived at the breach of the regulations in question they ought to find a verdict for him. The *onus* of proof lies upon the mine owners to show that they had not failed in their duty to take care.

Decision of C. A. (*supra*) affirmed on different grounds, some of the reasons given by C. A. being dissented from.

2982.—*Butler* (or **Black**) *v. Fife Coal Co.*, [1912] A. C. 149; 81 L. J. P. C. 97; 106 L. T. 161; 28 T. L. R. 150; [1912] S. C. (H. L.) 33; 49 Sc. L. R. 228; reversing [1909] S. C. 152; 46 Sc. L. R. 191; 2 B. W. C. C. 456—H. L. (Sc.).

The husband of the pursuer was killed by an outbreak of poisonous gas while working in the employment of the defenders, a limited company, in a coal mine of which they were owners. In an action for damages at common law and alternatively under the Employers' Liability Act, 1880, the sheriff-substitute found that the defenders were liable, inasmuch as they had failed to appoint officials competent for the working of the mine, and he assessed the damages at £400. On appeal the Court of Session held that the defenders were not liable at common law, having used reasonable care in appointing managers of the necessary qualifications and experience; that although there had been a breach of the special rules applicable to the mine under s. 49 of the Coal Mines Regulation Act, 1887, these rules prescribed the duties of the managers and firemen and imposed no duties directly on the owners of the mine; but, secondly, that the defenders were liable under the Employers' Liability Act, 1880, in respect of the negligence of their servants and their failure to comply with the rules in question, and the court awarded as damages £282.

HELD—that there was a duty on the defenders as owners of the

mine to appoint and keep in charge persons competent to deal with the dangers arising in the mine ; that they had not discharged this duty, and were therefore liable at common law for the sum awarded by the sheriff-substitute.

Notes.—It was held that though there was not an absolute duty imposed on the mine owner to see that the rules were observed, it placed on him, in the event of a breach of a rule, the *onus* of proving that he had done everything that was practicable to have the rule observed. If he failed to discharge this *onus*, he was liable at common law for any damage resulting therefrom, and could not derive protection from the doctrine of common employment.

With regard to the duty placed on the mine owner, by statute, *David v. Britannic Merthyr Coal Co.* [2981] was cited.

The statutory duty is imposed on the mine owners or employers personally, which they cannot throw upon their servants, and thus rid themselves of liability.

If a rule is broken and harm ensues, this is *prima facie* evidence of a failure of duty, and although the employer may have a complete defence, the burden of proving it lies on him.

The general rule, where the balance is even as to negligence, is that the party who founds upon the negligence of another must prove his cause of action, but the scale is turned when it is proved that an accident has happened which the employer was bound to prevent.

Once such a duty is established there is no question as to the civil liability.

Groves v. Wimborne (Lord), [1898] 2 Q. B. 402, referred to. Reference may also be made to *Blamires v. Lancashire and Yorkshire Railway* (1873), L. R. 8 Ex. 283; *Britton v. G. W. Cotton Co.* (1872), L. R. 7 Ex. 130; *Baddeley v. Granville* (1887), 19 Q. B. D. 423 [3216]; *Coe v. Platt* (1852), 7 Ex. 460; *Ross v. Ruge-Price* (1876), 1 Ex. D. 269; *Caswell v. Worth* (1856), 5 E. & B. 849; *Kelly v. Glebe* (1893), 30 Sc. L. R. 758; *Rogers v. Westminster Brymbo Co.* (1914), L. J. C. C. R. 36. Contrast *Norton v. Kearon* (1876), Ir. R. 6 C. L. 126; *Atkinson v. Newcastle Waterworks* (1877), 2 Ex. D. 441; *Jones v. Canadian Pacific Railway* [2995].

2983.—*Lavell v. Howell* (1876), 45 L. J. C. P. 387; 1 C. P. D. 161; 34 L. T. 183; 24 W. R. 672.

The principle which exempts a master from liability to his servant for injury caused by the negligent act of a fellow-servant or fellow-workman, is, that the servant must be assumed to have contemplated and tacitly assented to encounter the ordinary risk incident to the service of employment, at the time of entering into the contract.

The plaintiff (who was a licensed waterman and lighterman) was in the employ at weekly wages of the defendant, a corn merchant and warehouse keeper; his ordinary duty being to attend at the waterside of the premises every tide for about an hour and a half before and after high water, for the purpose of bringing barges to and from the wharf and there mooring and unmooring them. It was no part of his duty to load or unload the barges or to assist in any way in the work of the warehouse; but it was his habit to go to

the office on the land side of the warehouse for orders, or when sent for by the defendant's manager. There were two ways of going there, viz., by landing from his boat at stairs at the end of the street next adjoining the warehouse, or by stepping from the barges into and going through the warehouse and out by a door to the street. He usually went by this latter way. Being on the barges at a time when his actual duty did not require him to be there, he was sent for to the office, and was proceeding thither by his accustomed route, when, in passing out from the warehouse door to the street, he was knocked down and injured by a sack of grain which another of the defendant's men was in a negligent manner hoisting by means of a crane from a waggon.

HELD—that this was an injury caused by the negligence of a fellow-workman, within the above-mentioned exception, and consequently that the master was not liable.

Per Archibald, J. : The effect of the cases may be expressed in this way, that where a person enters into a particular service, he engages in consideration of the wages which he receives to run all risks incidental to the service, and among them the risk of any injury which may be caused to him by the negligence of his fellow-servants.

Notes.—The following cases were relied upon : *Morgan v. The Vale of Neath Railway Co.* [2985] ; *Tunney v. The Midland Railway Co.* [3012] ; *Priestly v. Fowler* [2980].

2984.—*Wiggett v. Fox* (1856), 11 Ex. 832 ; 25 L. J. Ex. 188 ; 2 Jur. N. S. 955 ; 4 W. R. 254.

A master is not responsible to one servant for an injury occasioned to him by the negligence of a fellow-servant whilst they are acting in one common service ; but this rule does not hold where the person doing the injury is not a person of ordinary skill and care.

Certain persons, having contracted with the Crystal Palace Co. to build a tower there employed a sub-contractor to do the earthwork, who employed workmen under him. While one of these was at his work at the foot of the tower, a workman, employed by the contractors to work at the top of it, negligently let fall a heavy substance upon him, whereby he was killed.

HELD—that in the absence of proof that the workman who caused the death was not a person of ordinary skill and care, no action could be maintained against the contractors by the personal representatives of the person killed.

2985.—*Morgan v. The Vale of Neath Railway Co.* (1865), 5 B. & S. 736 ; 35 L. J. Q. B. 23 ; L. R. 1 Q. B. 149 ; 13 L. T. 564 ; 14 W. R. 144—Ex. Ch.

Where servants are engaged in a common employment, and with a common object, injury sustained by one servant in consequence of the negligence of a fellow-servant gives no right of action against the master, although the servants are not engaged in effecting the same common immediate object, but are occupied in different departments of duty.

The risk of injury from the negligence of a fellow-workman is an ordinary incident of the employment which the workman is to be deemed to have agreed to impliedly.

Whenever the employment of a railway servant is such as necessarily to bring the person accepting it into contact with the traffic of the line, risk of injury from the carelessness of those managing that traffic is one of the risks necessarily and naturally incident to such an employment; and in case the servant suffers injury from the carelessness of the servants managing the traffic, the company is not liable.

A person was in the employment of a railway company as a carpenter, to do any carpenter's work for the general purposes of the company. He was standing on a scaffolding at work on a shed close to the line of railway, and some porters in the service of the company carelessly shifted an engine on a turn-table so that it struck a ladder supporting the scaffold, by which means he was thrown down and injured.

HELD—on the above principle, that the company was not liable.

Per Pollock, C.B.: "The workmen employed in such an establishment have all a common object, viz., to further the business of the establishment."

2986.—*Charles v. Taylor, Walker & Co.* (1878), 3 C. P. D. 492; 38 L. T. 773; 27 W. R. 32—C. A. See also [3022].

When two persons are working for the same master for a common general object, there is no liability upon the master to answer to either of them for damage resulting from the negligence of the other, although the actual piece of work on which they are engaged is not the same.

Per Brett, L.J.: If two persons are both servants of the same master, and the service of each brings him to the same place, and at the same time with the other, and one is negligently injured by the other, then the master is absolved from liability.

Per Cotton, L.J.: When once we have the fact that the plaintiff was a servant of the defendants, it comes within all the decisions to hold that he was in a common employment with the person through whose negligence he was injured. To constitute common employment the two persons need not be working at the same thing at the same time.

Notes.—In judgment the cases of *Wilson v. Merry* [2992] and *Morgan v. The Vale of Neath Railway Co.* [2985] were relied upon.

2987.—*Waller v. South Eastern Railway Co.* (1863), 2 H. & C. 102; 32 L. J. Ex. 205; 9 Jur. N. S. 501; 8 L. T. 325; 11 W. R. 731.

Where servants are engaged in one common object, an injury sustained by one servant, in consequence of the negligence of another servant, does not give a right of action against the master.

The guard of a train and the platelayers, whose duty it is to attend to the rails over which the train passes, are engaged in one common object, the safe conduct and transit of the train, and

therefore no action can be maintained against the company by the representative of a guard of a train killed by the train running off the line, in consequence of the neglect of the ganger of the platelayers to renew the decayed metals which fasten the chairs to the sleepers of the railway.

Notes.—Pollock, C.B., referred to Lord Cranworth's *dictum* in *Bartonshill Coal Co. v. Reid*, 3 Macq. 284 [3002], that "when a workman contracts to do work of any particular sort, he knows or ought to know, to what risks he is exposing himself."

2988.—*Vose v. Lancashire and Yorkshire Railway* (1858), 2 H. & N. 728; 27 L. J. Ex. 249; 4 Jur. N. S. 364; 6 W. R. 295.

A servant has no right of action against his master for injury done to him in the course of his employ by the acts of his fellow-servants; and if killed, no action can be maintained by his representative.

This rule does not hold where the master has personally interfered to direct the act which caused the injury or death.

Where a servant in the ordinary course of his employment is killed by the negligence of one who is not his employer and not a fellow-servant, his widow may maintain an action against the employer.

Notes.—Compare *Warren v. Wildee*, [1872] W. N. 87, where a barmaid was injured by an escape of gas caused by a defect in a gas pipe which her employer (who was not a plumber) had attempted to repair.

2989.—*Wigmore v. Jay* (1850), 5 Ex. 354; 19 L. J. Ex. 300; 14 Jur. 837.

A master is not in general liable to his servant for damage resulting from the negligence of a fellow-servant, in the course of their common employment.

Hutchinson v. York, Newcastle and Berwick Railway Co. [2990] and *Priestly v. Fowler* [2980] followed.

2990.—*Hutchinson v. York, Newcastle and Berwick Railway Co.* (1850), 6 Railw. Cas. 580; 5 Ex. 343; 19 L. J. Ex. 296.

The rule in *Priestly v. Fowler* [2980] must be qualified by the rule that the master must have taken due care not to have exposed his servant to unreasonable risks.

Per Alderson, B.: A master is not exempt from responsibility where the servant injured was not at the time of the injury acting in the service of the master. In such a case the servant injured is substantially a stranger, and entitled to all the privileges he would have had if he had not been a servant.

(2) *Master's Liability for Incompetent Servants.*

2991.—*Tarrant v. Webb* (1856), 18 C. B. 797; 25 L. J. C. P. 261; 4 W. R. 640.

A master is not generally responsible for an injury to a servant from the negligence of a fellow-servant, but the rule is subject to this qualification, that the master uses reasonable care in the selection of the servant.

He is not bound to warrant the competency of his servants; and in an action against him for an injury done by one of his servants to another, the question for the jury is, not whether the servant was incompetent, but whether the master did not exercise due care in employing him.

2992.—*Wilson v. Merry and Cunningham* (1868), L. R. 1 H. L. Sc. 326; 19 L. T. 30—(Sc.).

The liability or non-liability of a master to his workmen cannot depend upon the question whether the author of the accident is or is not in any technical sense the fellow-workman or collaborateur of the sufferer. The case of the fellow-workman is an example of the rule, not the rule itself; the rule stands on broader grounds. The master is not, and cannot be liable to his servant unless there is negligence on the part of the master in that in which he, the master, has contracted or undertaken with the servant to do. A master does not contract or undertake with his servant to execute in person the works connected with his business. What the master is bound to his servant to do in the event of his not personally superintending the work, is to select proper and competent persons to do so, and to furnish them with adequate materials and resources for the work. When he has done this, he has done all that he is bound to do; and if the persons so selected are guilty of negligence, it is not the negligence of the master; and if an accident occurs to a workman to-day in consequence of the negligence of another workman, skilful and competent, who was formerly, but is no longer, in the service of the master, the master is not liable, though the two workmen cannot technically be described as fellow-workmen. A master cannot warrant the competency of his servants.

Per Lord Colonsay: Culpable negligence in supervision, if the master takes the supervision on himself, or, where he devolves it on others, the heedless selection of unskilled or incompetent persons for the duty, or the failure to provide or supply the means of providing proper machinery or materials, may furnish grounds of liability.

Notes.—Negligence cannot exist if the master uses care to employ competent persons (*Tarrant v. Webb* [2991]).

It makes no difference to the exemption of the employer from liability whether or not the workmen are of different classes. *Wigmore v. Jay* [2994], *Gallagher v. Piper* [3021], and *Feltham v. England* [3017] referred to on this point.

2993.—*Edwards v. The London and Brighton Railway Co.* (1865), 4 F. & F. 530.

Evidence that the work done required skill and was being unskilfully and improperly done under the direction of a particular

foreman may be some evidence of negligence in employing him to direct it, but it is scarcely sufficient evidence *per se* and is amply met by positive evidence that persons of knowledge deemed him a person of competent skill and experience.

2994.—Wigmore v. Jay (1850), 5 Ex. 354; 19 L. J. Ex. 300; 14 Jur. 837. See S. C. [2989], [3062].

If in the selection of the servant who caused the injury the master has not taken reasonable care to choose a person of ordinary skill and care, or if the servant injured was not at the time of the injury acting in the service of his master, the master is liable.

2995.—Jones v. Canadian Pacific Railway (1913), 29 T. L. R. 773—(Up. Can. App.).

The doctrine of common employment does not apply to protect employers where in violation of a statutory duty they put in a position a servant not qualified for the particular work, and a fellow-servant is injured as a direct result of such unqualified servant's acts.

2996.—Hoey v. Dublin and Belfast Junction Railway (1870), Ir. R. 5 C. L. 206; 18 W. R. 930—(Ir.).

To an action by a servant against his employer for negligence in choosing a fellow-servant owing to whose incompetency he suffered an injury, it is not a sufficient answer that he previously to the injury, for a reasonable time in that behalf, was aware of the fellow-servant's incompetence.

Negligence on the part of the plaintiff would disentitle him to recover; but knowledge of the incompetence of the fellow-servant is only evidence of negligence on the plaintiff's part to be submitted to the jury.

Notes.—Monahan, C.J., referred in judgment to *Clarke v. Holmes*, 7 H. & N. 937 (in Ex. Ch.) [3067], where it is stated that the "plaintiff is not entitled to succeed if he is guilty of negligence in entering into or continuing in the employment after the state of the machinery became known to him." That case lays down the principle that knowledge is not *per se* evidence of negligence, but only a fact for the consideration of the jury. The question is, Was the servant guilty of negligence in entering into or continuing in the service after ascertaining the incompetency of his fellow-servant?

2997.—M'Ternan v. White and Bee (1890), 17 R. 368—(Sc.).

Pursuer was injured by the recklessness of a fellow-servant. He sought to make his employer liable on the ground that the fellow-servant was drunk and incompetent. The pursuer did not aver that he was not aware of the drunken state, etc. The action was dismissed as irrelevant.

2998.—Skerritt v. Scallan (1877), Ir. R. 11 C. L. 389—(Ir.).

In an action by a workman against his employer for negligence in the construction of scaffolding, the insecurity of which it was

alleged was known to the defendant, but not to the plaintiff, the defendant simply traversed negligence ; it appeared that the scaffolding was made by a fellow-workman, also in the employment of the defendant. The jury having found that the scaffolding was not constructed of unsound materials supplied by the defendant, and that he did not know that the materials were unsound ; that the scaffolding was insecurely constructed, but that the defendant did not know it, and that the plaintiff did know it ; that the fellow-workman was incompetent to make the scaffolding, but that the defendant was not aware of his incompetency ; the judge, upon these findings, directed a verdict for the defendant.

HELD (Deasy, B., *diss.*)—first, that the verdict so directed could not be upheld, inasmuch as the question whether the plaintiff knew that the scaffolding was insecure was not put in issue by the mere traverse of negligence ; and, secondly, that the verdict should be set aside for misdirection and a new trial awarded, upon the ground that the question whether the defendant had used due care in the selection of the fellow-workman had not been submitted to the jury.

When it is shown that a servant is incompetent, and that through his incompetency injury results to his fellow-servant, the mere fact of his incompetency throws the *onus* on the master of showing that he exercised due and reasonable care in selecting him. Absence of knowledge of the fellow-servant's incompetency is not, *per se*, an answer to the action, the master's true obligation being to use due care in selecting the servant.

Per Dowse, B. : If a servant sustains an injury while in his master's service, the master is responsible if the injury was occasioned by his negligence. The negligence may be established against him in one of two ways : either by a negligent personal interference on his part, or by his negligently employing an incompetent fellow-servant, if the injury was occasioned by the fellow-servant's incompetence.

Per Palles, C.B. : If the defendant would have ascertained the fellow-workman's incompetency, had he made the inquiries which he ought to have made, the knowledge he would thus have acquired ought to be attributed to him, and in that event it might be said that he ought to have known that the fellow-workman was incompetent.

Notes.—The cases of *Tarrant v. Webb* [2991] and *Wilson v. Merry* [2992] are relied upon in judgment.

2999.—*McCarthy v. British Shipowners' Co.* (1883), 10 L. R. Ir. 384.

3000.—*S. P., Byrne v. Fennell* (1882), 10 L. R. Ir. 397, n.

The deceased was employed, with others, to shift a cargo on the defendants' vessel. Upon going on board the names of the men employed were taken down by one of the officers, who told them to go down between decks to have supper. In going below it was necessary to pass round an open hatchway, which was insufficiently lighted, and the passage round which was obstructed by some

obstacles. The deceased, when returning from supper, fell through the open hatchway, and was killed.

HELD—upon these facts, that, even assuming negligence, it was the negligence of a fellow-servant of the deceased, and that, as there was no evidence of the negligent employment by the defendants of the incompetent fellow-servant, the plaintiff suing for damages for the death of the deceased was rightly nonsuited.

It is not true, as a general proposition of law, that a negligent act or default on the part of a servant is in itself evidence of the incompetence of such servant. Upon the plea traversing negligence by the defendant, the defence that the injury complained of was caused by the negligence of a fellow-servant is open.

Notes.—As to *M'Carthy's* case, this case followed the decision in *Byrne and Fennell*.

The cases of *Whelan v. City of Cork Steam Packet Co.*, I. R. 8 C. L. 383, and *Skerritt v. Scallan* [2998] were also cited on the question of negligence of a fellow-servant.

The question of extraordinary risks incurred by servants was also remarked on by Dowse, B. : “ If the risk is extraordinary, it may be necessary to show that the servant had knowledge when he entered into the employment of such risk, or if he had not such knowledge then he subsequently acquired knowledge of it, and that a reasonable time elapsed to put him in a position to guard against the danger.”

Whether a risk is ordinary or extraordinary is a question for the jury to decide.

“ If a master knew of a danger which his servant did not, and set him to it, why he would be liable ” (*Ogden v. Rummens*, 3 F. & F. 755, *per* Bramwell, B. [3064]).

Negligence is not always evidence of incompetence, for sometimes the most competent people are the most negligent.

This case differs from *Skerritt v. Scallan*, for in that case where it was shown that a servant was incompetent, and that through his incompetence an injury resulted to a fellow-workman, it was decided that the fact of incompetence cast on the defendant the *onus* of proving due care in selecting the servant. In this present case the plaintiff failed to prove that the fellow-servant was incompetent.

3001.—*Smith v. Howard* (1870), 22 L. T. 130.

Plaintiff was employed by defendant to work at a steam saw. It was necessary that he should have an assistant in the performance of his work, and M., defendant's foreman, engaged a boy for this purpose, who proved to be incompetent, and who, although plaintiff complained to M. of his incompetency, was retained in his service. It was M.'s duty as foreman to engage or discharge the person employed for the purpose of assisting plaintiff. An accident happened to plaintiff while working at the saw through the incompetence of the boy, and he brought his action against defendant.

HELD—that in the absence of any evidence to show that M. was incompetent for the position of foreman, the plaintiff could not recover ; it being M.'s duty to engage and discharge the boy, his retaining him after knowing of his incompetence was merely an act

of negligence by plaintiff's fellow-servant for which defendant was not responsible.

Per Kelly, C.B. : It is said that there is a qualification of the ordinary rule (*i.e.*, a case of one servant sustaining injury from the negligence of another). To this extent, *viz.*, that if the servant complains to the master of the incompetence of a fellow-workman or the unfitness of a piece of machinery, and is induced to go on working by a promise that the ground of complaint shall be remedied, the master may then make himself liable if an accident arises from his neglect to comply with his undertaking. But here the only complaint made was to a foreman and not to the master, and so the qualification does not apply.

3002.—Bartonshill Coal Co. v. Reid (1858), 3 Macq. H. L. 266; 4 Jur. N. S. 767; 6 W. R. 664. See also [3006].

Where workmen are engaged in a common work, and an injury happens to one of them through the negligence of another engaged in the same work, the master is not responsible unless the servant causing the injury was incompetent to discharge his duty.

If a master neglects to provide safe machinery and injury occurs to a workman through such defects, the master will be liable for any damage ensuing.

When workmen engage to serve a master in a common work, they know, or ought to know, the risks to which they are exposing themselves, including the risks of carelessness, against which their employer cannot secure them.

Notes.—The following cases were cited in judgment : *Stretton v. The London and North Western Railway Co.*, 16 C. B. 40; *Priestly v. Fowler* [2980]; *Hutchinson v. York, Newcastle and Berwick Railway Co.* [3011]; *Wigmore v. Jay* [2994]; *Skipp v. The Eastern Counties Railway Co.* [3085]; *Couch v. Steel* [3074]; *Paterson v. Wallace*, 1 Macq. H. L. 748 [3045]; *Brydon v. Stewart*, 2 Macq. H. L. 30 [3044]; *Sword v. Cameron* [3043]; *Dixon v. Ranken*, 14 D. 420; *Gray v. Brassey*, 15 D. 135; *O'Byrne v. Burn*, 16 D. 1025.

3003.—Allen v. New Gas Co. (1876), 45 L. J. Ex. 668; 1 Ex. D. 251; 34 L. T. 541.

A company had on its premises gates which were safe when open and wedged up, but liable to fall when closed. The attention of the manager had been directed to the unsafe condition of the gates, and orders had been given, but not carried out, to remedy this. A workman in the employ of the company passed through the gates when open, but on his return one of them was closed, and shortly afterwards, while he was working near the gates, they fell on and injured him. There was no evidence to show how this happened, nor any evidence that the manager and other persons employed by the company were incompetent.

HELD—that the company was not liable, as the plaintiff had not shown that the persons employed by the company were incompetent, and the negligence, if any, which caused the accident was that of a fellow-workman.

The plaintiff must give evidence of some specific act of negligence on the part of the defendant.

Per Huddleston, B.: "To establish negligence against the defendants, the plaintiff must prove that the defendants undertook personally to superintend and direct the works or that the persons employed by them were not proper and competent persons, or that the materials were inadequate. The *onus* is upon him, and failing to do so, he fails to establish negligence."

Notes.—The following cases were cited: *Wilson v. Merry* [2992]; *Bartonskill Coal Co. v. Reid* [3002]; *Lovegrove v. The London and Brighton Railway Co.* [3010]; *Cotton v. Wood*, 8 C. B. N. S. 568.

3004.—*McMillan v. Barclay, Curle & Co., Ltd.*, [1912] S. C. 263; 49 Sc. L. R. 242—Ct. of Sess.

A rivet boy, whose duty it was to run about the deck of a ship, then in course of construction, and pick up and throw overboard red-hot parings falling on it from above, slipped and fell over the side thereof and was killed. In an action of damages at the instance of his father against the employers, laid alternatively at common law and under the Employers' Liability Act, 1880, the pursuer averred that the defenders were in fault in failing to fence the deck, that this was a usual and necessary precaution, and that the defenders knew or ought to have known that the deck in question when wet (as it was on the day of the accident) was specially liable to become slippery. He also averred that it was the duty of the defenders' foreman, under whom the deceased was working, to take precautions against his falling over the side of the deck, that such precautions were usual and necessary in the circumstances, and that he had failed to take them.

HELD—that the action, so far as laid at common law, was irrelevant, on the ground that the pursuer's averments did not disclose a defective system or the failure to supply a competent foreman, but though the plaintiff could not recover at common law, he was entitled to succeed under the Employers' Liability Act, because the employers' foreman knew of the danger, and should have protected the workman, but failed to do so.

The plaintiff is entitled to succeed if he can prove a general custom to fence a place of this kind.

3005.—*Campbell v. United Collieries, Ltd.*, [1912] S. C. 182; 49 Sc. L. R. 140—Ct. of Sess.

A father raised in the Sheriff Court an action at common law, or alternatively under the Employers' Liability Act, against a colliery company for damages for the death of his son killed in their employment owing to his stepping upon a revolving wheel in the mine. The pursuer averred that the defenders had failed in their duty in respect that they ought to have fenced the wheel.

HELD—that the averment was a good averment of liability both at common law and under the Employers' Liability Act, and that

the ground of action being the same there was no need for discrimination between the two.

Notes.—In the course of judgment the following differences between liability at common law and under the Employers' Liability Act were pointed out :—

(1) The Employers' Liability Act does not give a new ground of action ; it leaves the grounds of action as it finds them, but takes away certain defences which were competent before the Act was passed. In certain cases it is necessary to give notice in order to distinguish between the alternative claims, but in this case the simple averment that works are in a defective condition is a good averment of liability both at common law and under the statute. The only difference is that the defence to one action is no defence to the other.

(2) At common law it is a good defence to say of that part of the works where the accident occurred, that the employer had not undertaken to supervise that portion himself, but had remitted such supervision to a qualified person, and had not interfered with or stopped that person in the procurement of such materials as were necessary for the performance of that work. But under the Employers' Liability Act that is not a good defence. The defendant has got to show that the works were in an efficient condition.

(3) *Persons in Common Employment.*

(a) FELLOW-SERVANTS AND PERSONS UNDER SAME CONTROL.

3006.—*Bartonshill Coal Co. v. Reid* (1858), 3 Macq. H. L. 266 ; 4 Jur. N. S. 767 ; 6 W. R. 664.

To constitute fellow-labourers within the meaning of the doctrine of common employment it is not necessary that the servant causing and the servant sustaining the injury should both be engaged in precisely the same, or even similar acts. Thus, the driver and guard of a stage-coach, the steersman and rowers of a boat, the man who draws the red-hot iron from the forge and those who hammer it into shape, the engine-man and the switcher, the man who lets the miners down into and who afterwards brings them up from the mine, and the miners themselves ; all these are fellow-labourers or co-laborateurs within the meaning of the doctrine in question.

3007.—*Coldrick v. Partridge, Jones & Co., Ltd.*, [1910] A. C. 77 ; 79 L. J. K. B. 173 ; 101 L. T. 835 ; 26 T. L. R. 164 ; 54 S. J. 132 ; 47 Sc. L. R. 610—H. L.

The respondents were owners of a colliery and of a railway in connection with it, and supplied a train on their railway by which their workmen could travel to and from their work. There was no obligation on the workmen to use the train, but no one excepting the respondents' workmen was allowed to use it.

A workman while travelling from his work on the train was killed in consequence of the negligence of a servant of the respondents who was engaged in repairing a bridge over the line,

In an action against the respondents to recover damages under the Fatal Accidents Act, 1846 :

HELD—that the defence of “ common employment ” was a good answer to the claim, as the accident had been caused by the negligence of a fellow-servant while the deceased was still in the position of a workman employed by the respondents.

3008.—Waldron v. Junior Army and Navy Stores, Ltd., [1910] 2 Ir. R. 381—C. A. (Ir.)

The employees in a large establishment belonging to the defendants, and consisting of numerous separate departments, were as a part of the contract of service entitled to purchase goods in any department at a reduced price. The plaintiff, who was employed in the toy department on the third floor of the building, while purchasing meat at the butcher's department on the ground-floor, slipped on a piece of fat negligently (as found by the jury) left on the floor by the butcher, and sustained severe injuries.

HELD—that the injuries were caused in the course of the plaintiff's employment by the negligence of a fellow-servant, and that the plaintiff could not sustain an action for damages against her employers the defendants.

The obligation of the employer to a servant is that he or she shall not be exposed to unreasonable danger by reason of the personal negligence of the employer ; but there is no responsibility for the consequences of negligence of other servants in the same employment in which the person injured is.

The Lord Chancellor : “ Every one of the persons employed in the same house as servants of the same master are fellow-servants.”

Notes.—As to whether the purchase and accident occurred in the course of employment one may refer to the words of Lord Loreburn, L.C., “ she would not be there but for her employment.”

The following cases were cited : *Tunney v. Midland Railway Co.* [3012] ; *Coldrick v. Partridge, Jones & Co., Ltd.* [3007]. Contrast [2990].

3009.—Smithwhite v. Moore & Sons (1898) 14 T. L. R. 461.

A workman in the employ of the defendants was sent by a fellow-servant to clean windows in a room which was imperfectly lighted and suffered an injury from a broken pane of glass which he did not observe.

HELD—that he had no cause of action against the defendants.

3010.—Lovegrove v. London, Brighton and South Coast Railway (1864), 16 C. B. N. S. 669 ; 33 L. J. C. P. 329 ; 10 Jur. N. S. 879 ; 10 L. T. 718 ; 12 W. R. 988.

A labourer was employed to do ballasting for a railway company and a fellow-servant was employed to lay tram-plates for the company, and whilst they were so employed the labourer, through the negligence of the fellow-servant, was injured.

HELD—that they were engaged in a common employment, and that the company was not liable for the damage.

As regards negligence of the defendant, it is not sufficient for the plaintiff to establish that he has been injured in a state of circumstances in which it may be that the defendants' negligence has led to the injury, and leave it to the jury to infer negligence, but he must go further and give some specific evidence of negligence in the person against whom he seeks to recover compensation.

Notes.—There was no evidence that the defendants had knowingly entrusted the duty of laying the rails to an incompetent person or that they had knowledge of defects in the rails. On the main point decided *Waller v. South Eastern Railway Co.* [2987] and *Priestly v. Fowler* [2980] were relied upon. On the question of evidence *Cotton v. Wood*, 8 C. B. N. S. 569, was referred to.

3011.—Hutchinson v. York, Newcastle and Berwick Railway Co. (1850), 5 Ex. 343; 6 Railw. Cas. 580; 19 L. J. Ex. 296. See S. C. [2990].

Where a servant of a railway company, who was proceeding in the discharge of his duty in a train belonging to the company, and guided by their servants, was killed by a collision between it and another of their trains guided by others of their servants:

HELD—that no action was maintainable by his personal representative against the company, and that it made no difference in this respect whether the accident was occasioned by the negligence of the servants guiding the train in which the deceased was, or of those guiding the other train, or of both.

3012.—Tunney v. Midland Railway Co. (1866), L. R. 1 C. P. 291; 12 Jur. N. S. 691.

B. was employed by a railway company as a labourer, to assist in loading what is called a pick-up train with materials left by platelayers and others upon the lines. One of the terms of his engagement was, that he should be carried by the train from Birmingham (where he resided, and whence the train started) to the spot at which his work for the day was to be done, and be brought back to Birmingham at the end of each day. As he was returning to Birmingham, after his day's work was done, the train in which B. was, through the negligence of the guard who had charge of it, came into collision with another train, and he was injured.

HELD—that inasmuch as he was being carried, not as a passenger, but in the course of his contract of service, there was nothing to take the case out of the ordinary rule, which exempts a master from responsibility for an injury to a servant through the negligence of a fellow-servant, when both are acting in pursuance of a common employment.

Per Willes, J.: The plaintiff was injured through the negligence of another servant.

The circumstances of the plaintiff's day's work being at an end when the accident happened can make no difference, for it was part

of his contract that he was to be carried by the train to and from the place where his work happened to be.

3013.—Hedley v. Pinkney & Sons' Steamship Co., [1894] A. C. 222 ; 63 L. J. Q. B. 419 ; 6 R. 106 ; 70 L. T. 630 ; 42 W. R. 497 ; 7 Asp. M. C. 483—H. L. (E.)

The master of a ship is engaged in common employment with the seamen on board, and, therefore (the case not being within the Employers' Liability Act), the owner of the vessel is not liable for injury caused to a seaman through the master's negligence.

Notes.—*Ramsay v. Quinn*, 8 Ir. Rep. C. L. 322, disapproved. *Wilson v. Merry* [2992] and *Johnson v. Lindsay* [3035] followed.

3014.—Downie v. Connell Brothers, Ltd., [1910] S. C. 781 ; 47 Sc. L. R. 666—Ct. of Sess.

A seaman brought an action for damages against the owners of a vessel, in which he averred that when he was lying ill on board, the master, "acting in the course of his employment, and in defenders' interest," in order to compel him to proceed with his work, assaulted him and pulled him from his berth, whereby his illness was aggravated.

HELD—that as the pursuer and master were fellow-servants the action must be dismissed as irrelevant.

3015.—Union Steamship Co. v. Claridge, [1894] A. C. 185 ; 63 L. J. P. C. 56 ; 6 R. 434 ; 70 L. T. 177 ; 7 Asp. M. C. 412 ; 58 J. P. 366—P. C. (New Zealand App.)

Where a shipping company employ a contractor to unload their ship, and appoint certain of the crew to assist in the unloading, it is a question of fact whether members of the crew were under the orders and control of the contractor's foreman or not, and whether, therefore, the company are liable to one of the contractor's workmen, who receives injuries through the negligence of such members of the crew.

3016.—Murphy v. Smith (1865), 19 C. B. N. S. 361 ; 12 L. T. 605.

To render a master liable for an injury to one in his employ through the negligence of another person also in his employ, it must be shown that the latter was placed by the master in such a position of trust and authority as to be fairly considered as his representative in the establishment.

Notes.—See *Gallagher v. Piper* [3021].

3017.—Feltham v. England (1866), 7 B. & S. 676 ; 36 L. J. Q. B. 14 ; L. R. 2 Q. B. 33 ; 15 W. R. 151.

The rule that a master is not liable to a servant for injuries sustained from the negligence of a fellow-servant in their common employment is not altered by the fact that the servant guilty of

negligence is a servant of superior authority, whose lawful directions the other is bound to obey.

Notes.—There being no evidence to show that the foreman was incompetent or that the master was negligent in employing him, the case was treated as indistinguishable from *Gallagher v. Piper* [3021], *Wigmore v. Jay* [2994], and *Skipp v. Eastern Counties Railway Co.* [3085].

3018.—*Conway v. Belfast and Northern Counties Railway Co.* (1877), Ir. R. 11 C. L. 345—Ex. Ch.

In the absence of evidence to show that the general traffic manager of a railway company occupies, towards the company, a position superior to that of fellow-servant with a milesman employed by the same company, they are to be taken to be fellow-servants, and the company is not liable for injuries caused to the milesman by the negligence of the traffic manager.

Per Palles, C.B. : “There is no distinction as to the exemption of a common employer from liability to answer for an injury to one of his workmen from the negligence of another in the same employment, in consequence of their being workmen of different classes.

“But a master may so depute to another the entire control of his establishment as to constitute such other person, not a fellow-servant having greater authority, but the *alter ego* or representative of the master.”

Notes.—*Feltham v. England* [3017] and *Gallagher v. Piper* [3021] cited; *Wigmore v. Jay* [2994] referred to and followed.

3019.—*Howells v. Landore Steel Co.* (1874), 44 L. J. Q. B. 25; L. R. 10 Q. B. 62; 32 L. T. 19; 23 W. R. 335.

The owners of a colliery within the Coal Mines Regulation Act, 1872 (35 & 36 Vict. c. 76), appointed a certificated manager as required by s. 26. A miner employed in the colliery was killed by an explosion of fire-damp, the death being caused by the negligence of the manager.

HELD—that the fact that the manager was appointed pursuant to the Act did not put him in any different position from that which he would have held had he been simply appointed manager; and that he was a fellow-servant with the deceased; and that the owners were, therefore, not liable to his representatives for his death.

Wilson v. Merry [2992] followed.

3020.—*Hall v. Johnson* (1865), 3 H. & C. 589; 34 L. J. Ex. 222; 11 Jur. N. S. 80; 11 L. T. 779; 13 W. R. 411—Ex. Ch.

The plaintiff was employed to work in a mine of the defendants. The defendants employed an underlooker, whose duty it was to see that the roof of the mine was propped as required when the mineral was withdrawn. The underlooker omitted to see that the roof was propped, and thereby a stone fell and injured the plaintiff.

HELD—that the underlooker was a fellow-servant of the plaintiff, and that as there was no evidence to show that the defendants were

negligent in selecting a proper underlooker, or in putting the mine in proper order, the defendants were not liable.

3021.—*Gallagher v. Piper* (1864), 16 C. B. N. S. 669; 33 L. J. C. P. 329; 10 Jur. N. S. 879; 10 L. T. 718; 12 W. R. 988.

The plaintiff was engaged as a scaffolder for the defendants, who were builders, and they employed a general manager of works, through whose negligence in not furnishing proper materials the plaintiff fell and was injured.

HELD—that the defendants were not liable for the injuries to the plaintiff.

Notes.—This case is similar to *Wigmore v. Jay* [2994]. There was no evidence of *personal* negligence on the defendants' part in failing to supply sufficient and safe materials, or in selecting an incompetent foreman. As to general negligence, *Cotton v. Wood*, 8 C. B. N. S. 568, and *Toomey v. London, Brighton and South Coast Railway Co.*, 3 C. B. N. S. 146, were referred to.

Williams, J., was doubtful whether the defendants were not liable, on the grounds that the general manager was a sort of deputy-master rather than a fellow-servant, so that a notice of the insufficiency of the materials to him would be notice to the defendants themselves. But there was hardly sufficient evidence to justify such a conclusion.

Byles, J., thought that the defendants were liable on the ground that it appeared from the evidence given that the manager was really acting master, and this distinguished the case from *Wigmore v. Jay*, in which case the negligent party was only a foreman.

Since the manager had been guilty of negligence, if he were deemed to be in the position of master, notice to him and his negligent misconduct would be notice to the defendants and negligence or misconduct of the defendants. *Personal* knowledge of the defendants is not indispensable. Again, had the manager been a partner with the defendants, notice to him would have rendered them liable: cf. *Mellors v. Shaw* [3068].

3022.—*Charles v. Taylor, Walker & Co.* (1878), 3 C. P. D. 492; 38 L. T. 773; 27 W. R. 32.

The defendants were brewers, having upon the Thames a wharf, where coals were discharged to be used in their business. The plaintiff was hired by A., to assist in unloading a barge at the wharf of the defendants. The plaintiff and A., with other men, formed a gang, the members of which were paid by the defendants at the rate of 1s. 9d. for every ton of coals discharged; one of the men was to receive from the defendants the money due for unloading the barge and to distribute payment amongst them; the defendants alone had power to dismiss the plaintiff. Whilst the plaintiff was engaged in unloading the barge, a servant of the defendants, who was engaged in moving some barrels, negligently let one of them slip upon an upraised flap, which fell and caused the plaintiff injury. The plaintiff had frequently been at the spot when the barrels were being moved.

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HELD—that the defendants were not liable to compensate the plaintiff for the injury sustained by him; for A. held the position of a foreman and not of a contractor, and the plaintiff was servant to the defendants, and he was engaged in a common employment with the servant by whose negligence the injury happened, and there was no concealed danger.

3023.—*Murray v. Currie* (1870), L. R. 6 C. P. 24.

The plaintiff was the servant of a stevedore. The stevedore was employed by the defendant. The plaintiff was injured by the servant of the defendant.

HELD—that he could not recover.

3024.—*Stamp v. Williams* (1896), 12 T. L. R. 516.

Stevedores employed M. to get a gang of men to do bushelling in the hold. Two of the men so employed were injured by the negligence of the stevedores' ordinary employees. At *nisi prius* the jury proved that the workmen injured were not in common employment with the negligent employees, but a new trial was ordered on appeal.

3025.—*Cahalane v. North Metropolitan Railway and Canal Co.* (1896), 12 T. L. R. 611.

Plaintiff was the servant of stevedores. The stevedores hired a crane from defendants. With the crane was a brakesman ordinarily in the employ of defendants. He worked from signals received from a servant of the stevedores. The injury was caused by the brakesman acting without such signal. At *nisi prius* the judge nonsuited the plaintiff, holding as a matter of law, and on the authority of *Donovan v. Laing*, [1893] 1 Q. B. 629, that the plaintiff and the brakesman were in common employment, but on appeal:

HELD—there must be a new trial, the question being one for a jury as to whether the brakesman had been given over by the defendants to the stevedores on the terms that he should exclusively obey the stevedores.

3026.—*Dalton v. Batchelor* (1857), 1 F. & F. 15.

In an action for negligence by the servants of the defendant in hauling timber so that it struck the plaintiff, who was passing at the time, the evidence being that the hauler was not in the defendant's general service, but was engaged for that particular piece of work, and brought his own horses for it; and that although it was being performed with the assistance of the defendant's workmen, and under the general superintendence of his foreman, the only mode in which the latter had interfered was by telling the men to make the horses go on dragging the timber, which, on their moving, casually swerved and so struck the plaintiff, Willes, J., directed a nonsuit, which the court only set aside because the point was not taken that both parties might be liable if there was evidence of negligence; but the court, doubting if there was any such evidence, and on a

second trial the jury, under the direction of Channell, B., found for the defendant.

(b) PERSONS IN QUASI-COMMON EMPLOYMENT.

3027.—*Lunnie v. Glasgow and South Western Railway* (1906), 8 F. 546—(Sc.).

A carter employed by a railway company left his lorry at his employers' goods station in charge of a boy ten years of age. The boy was not in the employment of the railway company, but was assisting the carter at his request. While the boy was in charge of the lorry he was injured, owing to the negligence of another carter, also employed by the railway company. In an action by the boy against the railway company :

HELD—that the boy having voluntarily assisted one of the railway company's servants was, as regards claims of damages against the company, in no better position than a servant employed by the company, and that the defence of common employment applied (*Potter v. Faulkner*, 31 L. J. Q. B. 30 ; 1 B. & S. 800, followed).

Volunteers to assist in work can be in no better position than a servant, and such persons come within the doctrine of common employment.

Notes.—This case closely resembles *M'Ewan v. Edinburgh and District Tramways Co.*, 6 S. L. T. 400, and must be distinguished from *Wright v. London and North Western Railway* [3038]. In *Potter v. Faulkner* (*supra*) the person volunteering had been requested to act by a servant; he was held to be in common employment. In *Degg v. Midland Railway*, 26 L. J. Ex. 171, it was held that a stranger who volunteers is in the same position as a fellow-servant. Contrast *Cleveland v. Spier*, 16 C. B. N. S. 399, where it was held that a passer-by casually asked to assist was not a volunteer, and *Abraham v. Reynolds*, 5 H. & N. 143, where a person asked to assist by the master was held not to be a fellow-servant.

3028.—*Bass v. Hendon Urban District Council* (1912), 28 T. L. R. 317—C. A.

The plaintiff, a boy of fourteen, who had been invited by the defendants' firemen to assist along with other boys in pulling the defendants' fire escape home after it had been used in fire drill, was injured in so doing. In an action claiming damages from the defendants the jury found (1) that the defendants were not themselves guilty of negligence; (2) that the fire escape was a fit and proper one for its purpose; (3) that the defendants' servants were guilty of negligence in the management of the fire escape or in allowing the plaintiff to pull it; and (4) that the plaintiff was not aware of the danger.

HELD (reversing *Darling, J.*)—that the boy though a volunteer was in the same position as a servant and that consequently the doctrine of common employment applied, and that judgment should be entered for the defendants.

3029.—Manning v. Adams Brothers (1884), 32 W. R. 430.

The plaintiff, employed as foreman of a stevedore to unload a ship with the assistance of the crew, was injured by the negligence of one of the crew in the quasi-employment of the stevedore.

HELD—that the shipowners were not liable.

Notes.—The stevedore had control over the crew which was lent him, and the crew took their orders from the plaintiff. Therefore the negligent party was in common employment with the plaintiff. (See *Murphy v. Caralli*, 13 W. R. 165 ; 3 H. & C. 462.)

3030.—Rourke v. White Moss Colliery Co. (1877), 2 C. P. D. 205 ; 46 L. J. C. P. 283 ; 36 L. T. 49 ; 25 W. R. 263—C. A.

A company having begun sinking a shaft in their colliery, for which purpose they had fixed an engine near the mouth of the shaft, agreed with W. to do the sinking and excavating at a certain price per yard, W. to find all labour, the company to provide and place at the disposal of W. the necessary engine power, ropes and hoppets, with an engineer to work the engine (who was employed and paid by the company), the engine and engineer to be under the control of W. One of the men employed and paid by W., while working at the bottom of the shaft, was injured by the negligence of the engineer.

HELD—that though the engineer remained the general servant of the company, yet being under the orders and control of W. at the time of the accident, he was acting as the servant of W., and not of the company, which was therefore not liable for his negligence.

Per Cockburn, C.J. : When one lends his servant to another for a particular employment, the servant for anything done in that particular employment must be dealt with as the servant of the man to whom he is lent, although he remains the general servant of the person who lent him.

3031.—Atkinson v. Surrey Vaudeville Theatre, Ltd. (1908), *Times*, March 6th.

The plaintiffs were music-hall artists and claimed damages for injuries sustained by them during their performance at the defendants' theatre through the negligence of the defendants' servants. The defence included a plea that the plaintiffs and the said servants were in the common employment of the defendants, and therefore not entitled to recover.

HELD—that the doctrine of common employment must prevail, and that an amendment of the statement of claim alleging the contract to have been made with a party other than the defendants could not be allowed as it would deprive the defendants of a legal right.

On a second action being brought, when the agreement was alleged to have been made with M., it appeared that M. was the agent of the defendants, and the doctrine of common employment was held to apply. Judgment was given for the defendants.

Times, November 16th, 1908—Ridley, J.

(4) *Persons not in Common Employment.***3032.—Percy v. Donaldson**, [1909] S. C. 267—Ct. of Sess.

In an action of damages at common law, the pursuer averred that while walking on a quay in Glasgow Harbour he was injured through the negligence of the defenders' servants, who allowed a heavy stanchion to fall from a ship upon him. He admitted that during the same day he had been in the employment of the defenders at the ship as a casual labourer, engaged and paid by the hour; that his work had ceased at 6 p.m.; and that the accident occurred about ten minutes later, when he was on his way to the defenders' pay box, about fifty yards from the ship, to receive his wages. The defenders maintained that the pursuer was still in their employment when he received the injury, and pleaded the defence of common employment.

HELD—that the fact of the pursuer's wages being still unpaid when the accident occurred, and of his being on his way to receive payment, did not in itself justify the conclusion that he was still in the defenders' service, and so entitle them to plead the defence of common employment.

The relation of employer and employed ends when the one has ceased to have any right to exact services and the other has no duty to render services.

The character of servant cannot adhere to a man merely because he has a claim for payment for past services.

Notes.—*Brydon v. Stewart*, 2 Macq. 30 [3044], and *Burr v. The Theatre Royal, Drury Lane*, [1907] 1 K. B. 544, were distinguished in judgment.

3033.—M'Cartan v. Belfast Harbour Commissioners, [1910] 2 Ir. R. 470—C. A. On appeal, [1911] 2 Ir. R. 143; 44 Ir. L. T. 223.

The Belfast Harbour Commissioners have, under their statutory powers, the control of the harbour and of all piers, docks, and quays belonging to it; and it is their duty to assign a berth to a vessel to be discharged in the port; they have power to provide cranes for the unloading of such vessels, and it is their duty to provide proper servants and labourers for working such cranes for the use of the public. The master of a vessel hired a crane from the commissioners for the purpose of her discharge. He signed a request for its use, subject to the commissioners' regulations, containing an agreement that he was to be responsible for all loss or damage arising from any improper use of the crane while so employed. The crane was put in position by the craneman, and the vessel was moved to a berth opposite it. The practice is that the buckets are filled by the hirer's servants in the hold, one of whom directs the craneman to raise and lower each bucket and to swing round the arm of the jib. The craneman regulates by a brake the speed of ascent and descent of each bucket, and he alone works the machine. While the plaintiff, being employed for that purpose by the shipmaster, was filling a bucket in the hold, an empty bucket, while being lowered by the crane, descended with great speed and violence and struck the plaintiff,

who was seriously injured. The craneman was employed and paid by the commissioners, who alone could dismiss him. Except in directing buckets to be raised or lowered, neither the hirer nor his servants had any control over the craneman. If the shipmaster was dissatisfied, his only remedy would be to direct the craneman to stop working, and to apply to the commissioners to send another in his place, which they might or might not do. In no event could the hirer employ a servant of his own to work the crane or procure a crane workable on the pier from any one but the commissioners. In an action by the plaintiff against the commissioners to recover damages for personal injuries, the jury found that the hirer had no authority to control the craneman otherwise than in respect of the time and place of movement of the crane, and the time of raising and lowering the buckets; that the bucket which injured the plaintiff got out of the control of the craneman through his negligence; and that this negligence was the cause of the accident.

HELD—that the plaintiff was entitled to a verdict; that the agreement of the hirer to be responsible for any improper use of the crane afforded no defence to the plaintiff's action, and that the plaintiff and craneman were not at the time of the accident fellow-servants engaged in a common employment.

Donovan v. Laing, 63 L. J. Q. B. 25; [1893] 1 Q. B. 629, distinguished.

On appeal to the House of Lords :

HELD, on the facts, in an action by a seaman engaged in unloading a vessel who was injured by the negligence of the craneman in lowering the bucket—that the craneman was not the servant of the hirer, and the respondents were liable in damages for the injury to the seaman.

Donovan v. Laing considered.

3034.—*Swainson v. North Eastern Railway* (1878), 47 L. J. Ex. 372; 3 Ex. D. 341; 38 L. T. 201; 26 W. R. 413—C. A.

A person who is injured by the negligence of another's servant cannot be a fellow-servant with the servant whose negligence causes the injury, so as to exempt the master from liability, unless he is under the control and orders of the master.

Per Brett, L.J.: Common employment, or work done in common by servants under a common master, is necessary to raise the exception to the general rule of liability. We cannot say that the common service required need arise out of a binding contract to serve for a definite time, or on which the complainant is to receive wages; for there are cases of volunteers, and other cases in which there is certainly no contract and no payment in virtue of one. But when the volunteer cases are looked at, it will be found that they are all cases of volunteering to *serve*.

At Leeds there are two railway stations adjoining one another, one belonging to the Great Northern Railway Co. and the other to the North Eastern Railway Co. Part of the lines running into the two stations is used in common by the two companies for the interchange of traffic between the two lines. This part is under the

management of a joint station staff in the employment of the Great Northern Railway Co. Half of the wages of the joint station staff is paid by the North Eastern to the Great Northern Railway Co. While S., a signalman on that staff, was employed in his ordinary duties, he was struck and killed by a passing engine of the North Eastern Railway Co., which at the time he was not engaged in signalling, through the negligence of the driver. In an action against the North Eastern Railway Co. by his widow, under Lord Campbell's Act, it appeared that the deceased was in no sense the servant of the *North Eastern Railway Co.* He was not engaged by them. He received no part of his wages from them; they could not discharge him; they could give him no orders, except by the authority of the Great Northern Co., so that such orders would be in point of fact the orders of the Great Northern.

HELD—that the deceased was not, at the time of his death, engaged in a common employment or service with the engine-driver so as to take away the liability of that company for the negligence of their servant; and that the widow was entitled to recover.

3035.—Johnson v. Lindsay, [1891] A. C. 371; 61 L. J. Q. B. 90; 65 L. T. 97; 40 W. R. 405; 55 J. P. 644—H. L. (E.)

In an action to recover damages for injury caused by the negligence of the defendant's servant, the defence of common employment is not applicable unless the injured person and the servant whose negligence caused the injury were not only engaged in a common employment but were in the service of a common master.

Builders contracted to build a block of houses under a specification prepared by the owners' architect, certain fire-proof portions of the houses to be executed by the respondents, who were iron-founders. The respondents contracted with the architect to do their portion of the work, and had no contract with the builders and were not under their direction or control. While the respondents were carrying out their contract workmen employed by them in raising concrete to the upper storey of the building negligently let a bucket fall on the appellant, who was working in the lower storey in the employment of the builders. In respect of the injury thus caused the appellant brought an action against the respondents.

HELD—that since the relation of master and servant did not exist between the respondents and the appellant the doctrine of *collaborateurs* did not apply and the action was maintainable.

Notes.—In the judgments in the House of Lords *Wilson v. Merry* [2992] and *Wigget v. Fox* [2984] were commented upon. *Johnson v. Lindsay* may be regarded as overruling *Woodhead v. Gartness Mineral Co.* (1877), 4 R. 469; the overruled case was followed in *Wingate v. Monkland Iron Co.* (1884), 12 R. 91; *Maguire v. Russel* (1885), 12 R. 1071; *Congleton v. Angus* (1887), 14 R. 309. These, therefore, are also, in effect, overruled. *Maguire v. Russell* was, in fact, expressly disapproved in *Johnson v. Lindsay*. This present case was followed in *M'Callum v. North British Railway Co.* (1893), 20 R. 385.

3036.—Warburton v. Great Western Railway (1866), 4 H. & C. 695 ; 36 L. J. Ex. 9 ; L. R. 2 Ex. 30 ; 15 L. T. 361 ; 15 W. R. 108.

A railway station, which was used both by the Great Western Co. and the London and North Western Co., was under the charge of a servant of the London and North Western Co. A train belonging to the Great Western Co., and driven by one of their drivers, having been improperly and negligently shunted into a siding, injured a servant of the London and North Western Co., who was there engaged in cleaning carriages.

HELD—that the injury was caused by the negligence of the driver in the discharge of his ordinary duty to the Great Western Co. alone, and not in the course of any common employment with the plaintiff ; and that, therefore, he could maintain an action for damages against the Great Western Co.

3037.—Smith v. Steele (1875), 44 L. J. Q. B. 60.

A pilot is not a fellow-servant with the master and crew of the ship he takes control of compulsorily.

3038.—Wright v. London and North Western Railway (1876), 45 L. J. Q. B. 570 ; 1 Q. B. D. 252 ; 33 L. T. 830—C. A.

A railway company contracted to carry a heifer by train to Penrith station on their line. The plaintiff travelled by the same train, and on arriving at Penrith he, with the assent of the station-master, assisted to shunt the horse-box, in which the heifer was, in order to hasten delivery, and while so doing was injured by the servants of the company.

HELD—that the company was liable.

Per Lord Coleridge, C.J. : The present case is not a case of master and servant, but a case within the principle of *Holmes v. The North Eastern Railway Co.*, 38 L. J. R. Exch. 161, of a consignee entitled to delivery and carriers bound to make delivery. The consignee with the assent of the carriers is engaged for the convenience of both parties in taking delivery in a particular way, and the carriers are bound to see that while he is so engaged he is not injured through the negligence of themselves or their servants.

Notes.—Contrast with this case *Lunnie v. Glasgow and South Western Railway* [3027]. Mellish, L.J., in judgment differentiates between *Wright's* case and *Degg v. The Midland Railway Co.*, 1 H. & N. 773. See also *Potter v. Faulkner*, 1 B. & S. 800.

3039.—Turner v. Great Eastern Railway (1875), 33 L. T. 431.

A railway company employed a contractor to unload their coal trucks at shoots on sidings constructed for the purpose. The contractor employed his own labourers, among whom was the plaintiff, whom he engaged and paid, and over whom he had entire control. The plaintiff, while engaged in the work, was injured by the negligent shunting of an engine managed by the servants of the company which was bringing coal trucks on to the sidings to the shoots.

HELD—that there was no such common employment between the plaintiff and the shunter as would disentitle the former from bringing an action against the company for the negligence of their servants.

Per Lord Coleridge, C.J. (as to whether plaintiff was in the defendants' employ): "Suppose the situations reversed, and that the plaintiff had negligently caused injury to some one else. It seems to me extravagant to say that such a person could sue the now defendants for such injury. They would say in defence, and as I think say unanswerably, we had no control over the man, we did not engage him, and could not dismiss him, we are therefore not liable for his negligence. If, then, in such case an action would not lie against the railway company, it follows that the same ground which would save them there, would make them liable here."

Per Grove, J.: "Where a person undertakes a service he has the power of remonstrating in reference to anything he does not like or considers dangerous, or he may by giving notice give up the service. But here the plaintiff would not have been able to do either of these things as regards the defendants."

Distinguish *Wigget v. Fox* [2984].

3040.—The Petrel, [1893] P. 230; 62 L. J. P. 92; 1 R. 651; 70 L. T. 417; 7 Asp. M. C. 434.

Where two vessels came into collision with each other, belonging to the same owners and the same line, and frequent the same port and river in which the collision occurred, the master and crew of one vessel are not in a common employment with the master and crew of the other vessel.

Notes.—In judgment the President (Sir F. Jeune) quoted with approval the *dictum* of Blackburn, J., in *Morgan v. The Vale of Neath Railway Co.* [2985]. "There are many cases where the immediate object on which the one servant is employed is very dissimilar from that on which the other is employed; and yet the risk of injury from the negligence of the one is so much a natural consequence of the employment which the other accepts that it will be included in the risks which are to be considered in his wages." The President continued: "*Hutchinson v. The York, etc., Railway Co.* [3011] was decided on this principle. If this risk to one servant is a natural consequence of misconduct of another servant, then the skill and care of the one is of special importance to the others by reason of the relations between their services. But can it be said that the safety of the captain of one ship of a company is, in the ordinary course of things, dependent on the skill and care of the captain of another ship of the same company, or that injury by the negligence of one is an ordinary risk of the service of the other?"

"It might perhaps be so, if all the ships of the company were in the habit of meeting in the same dock; but in regard to navigation on the high seas, would a captain of one ship of a company have more reason to be interested in the skill of the captain of another ship of the company, than in the masters of other craft in whose vicinity he might happen to navigate? By no reasonable supposition can

it be imagined that he would. Therefore there can be no common employment."

3041.—Cameron v. Nystrom, [1893] A. C. 308; 62 L. J. P. C. 85; 1 R. 362; 68 L. T. 772; 7 Asp. M. C. 320; 57 J. P. 550—P. C.

There must be a common master as well as a common employment.

A firm of stevedores was employed by the master of a ship to discharge her cargo at a certain rate per ton. The ship was to supply the discharging gear, but the stevedores brought their own men to effect the discharge. The discharging gear had been fixed in an improper and negligent manner by the stevedores' foreman, and its being so fixed was the cause of injury to the plaintiff, a seaman employed on board the vessel. The placing of the plaintiff where he was working at the time of the accident was, in the circumstances, an act of negligence.

HELD—that the stevedores were liable for the injury to the plaintiff caused through the negligence of their servants.

Johnson v. Lindsay [3035] approved and followed.

3042.—Moore v. Palmer (1886), 51 J. P. 196—C. A.

A stevedore contracted to load a ship and hired an engine from P., who sent his servant N. to work it. M., a servant of the stevedore, gave the signals to N., and by N.'s negligence a sack fell and killed M. The wages of M. were paid by P.

HELD—that N. was the servant of P., and that P. was liable to M.'s representatives for compensation.

Rourke v. White Moss Colliery Co. [3030] distinguished.

II. *Master's Duty to take Reasonable Care.*

3043.—Sword v. Cameron (1839), 1 D. 439.

A master is responsible if he fails to carry on his business on a proper system and with due and reasonable care for the safety of his servants whether he personally attend to his business or not.

Notes.—In this case the workman was injured in consequence of time fuses being timed to go off too quickly. Contrast *Mulligan v. M'Alpine* (1888), 15 R. 789, where the practice was to take blasting powder out of small barrels and the workman was injured in consequence of a spark exploding the powder in the barrel. The employer was held not liable. Contrast also *Bruce v. Barclay* [3046]. Compare *Gibson v. Nimmo & Co.* (1895), 22 R. 491, where it was held negligence at common law to employ child labour at dangerous work, and *Wilson v. Glasgow Corporation* (1901), 9 S. L. T. 133, where an averment that poisonous paint was given to the workman to use without warning him of its dangerous nature was held sufficient to warrant an issue of negligence. See also *M'Guire v. Cairns & Co* (1890), 17 R. 540, where in an action at common law it was held that the employer in the case of dangerous

employments was negligent if he failed to make arrangements so that the work could be carried out in safety to the workman. See also *M'Inally v. King's Trustees* (1886), 14 R. 8, where the work was dangerous and the master was held negligent at common law for failing to give adequate warning, and where the question of contributory negligence was also considered. In *Murdock v. Mackinnon* (1885), 12 R. 810, a miner was injured in consequence of running his hutch into the shaft instead of into the cage. The cage was not there, in consequence of a mistake in a signal to the cage-winder. The signal was given by word of mouth. It was held that the defenders were liable because a safer working of signals was reasonably necessary and because there was no bottomer to superintend the placing of the hutches on the cage.

This present case was approved in *Smith v. Baker* [3075]; and see also *Bartonshill Coal Co. v. McGuire*, 3 Macq. 300.

3044.—Brydon v. Stewart (1855), 2 Macq. H. L. 30.

3045.—Paterson v. Wallace (1854), 1 Macq. H. L. 748.

A master is bound to take all reasonable precautions to secure the safety of his workmen.

It is no answer to a claim of damages by the surviving relatives of a workman accidentally killed in a mine, "which was not in a safe and sufficient state," to say that he was at that moment of time in the act of leaving the work for a purpose of his own.

A master who lets a workman down his mine is bound to bring him up safely, even though he comes up on his own business, and not for that of his master.

Per the Lord Chancellor (in *Brydon v. Stewart*): It is the duty of the master *quod* master, in his capacity of master, to take the miners up safely.

For that purpose the obligation of the master continues after they have, in truth, ceased to work in his employ, but while they were causing themselves to be removed from it.

3046.—Bruce v. Barclay (1890), 17 R. 811; 27 S. L. R. 670.

The mere fact that an employment is dangerous is not sufficient to prove negligence in the employer, at least where the employed are as competent to judge of the danger as the employer.

Notes.—Here a ship was being pulled to pieces with wire ropes and a donkey engine, the workman was killed by a beam in the ship suddenly giving way.

3047.—Riley v. Baxendale (1861), 6 H. & N. 445; 30 L. J. Ex. 87; 9 W. R. 347.

From the mere relation of master and servant no contract can be implied on the part of the master to take due and ordinary care not to expose the servant to extraordinary danger and risk in the course of his employment.

3048.—Weems v. Mathieson (1861), 4 Macq. H. L. 215.

A master of dangerous works is bound to be careful to prevent accidents to those employed by him. If his machinery or apparatus is not staunch and appropriate, or if he permits it to be used without proper guards, and mischief consequently arises, he will be responsible.

A person is a dependant who, being within the required relationship, was in fact dependent on the deceased at the time of the accident.

Per Lord Cranworth: All that a master is bound to do is to provide machinery fit and proper for the work, and to have it superintended by himself or by his workmen in a fit and proper manner.

3049.—Potts v. Port Carlisle Dock and Railway Co. (1860), 2 L. T. 283; 8 W. R. 524.

In order to render a master liable for an injury to his servant, caused by the breaking of a machine belonging to the master, it is not sufficient to show that the machine was defectively constructed or altered, but there must also be evidence that the master employed incompetent persons to construct or alter the machine.

3050.—Griffiths v. Gidlow (1858), 3 H. & N. 648; 27 L. J. Ex. 404.

A workman employed with others in sinking a pit, being at the bottom, was injured by the fall of a tub of water, which was being drawn up by machinery. Evidence was given that the tackle was imperfect, not being pulled with a safe hook, and that a jiddy should have been used. He worked with the hook, making no complaint of it; a jiddy had been provided by the master, who had directed that it should be used when earth was raised. In his master's presence he had complained that the jiddy was not used for water.

HELD—that the master was not liable, because assuming the injury to have arisen from neglect to use the jiddy, the master, having provided a proper apparatus, was not liable for the neglect of the fellow-workmen in omitting to use it.

3051.—Murphy v. Phillips (1876), 35 L. T. 477; 24 W. R. 647.

A chain broke, partly from wear and partly from bad welding, and injured the servant using it. His master had not had it examined or tested, although there are well-known methods for doing so.

HELD—that the master was liable for the injury caused to the servant.

Where there is a failure to perform the legal duty to take reasonable care that dangerous machinery, or machinery, which, if not in perfect order, must be dangerous, is in a fit and proper condition, then the master is *primâ facie* liable.

Notes.—Reference may also be made to *Manser v. East Coast Railway* (1861), 3 L. T. 585, and *Gavin v. Rogers* (1889), 17 R. 206.

3052.—Welsh v. Moir (1865), 12 R. 590.

Owing to a pivot breaking, a crane fell and killed a workman. It was being used to tear up rails.

HELD—that the crane was being put to an improper use, and the contractor not having proved that the breaking was due to a latent defect in the crane he was liable.

Where the workman is ignorant, so that he does not appreciate the risk, the maxim *Volenti non fit injuria* does not apply.

3053.—*Searle v. Lindsay* (1861), 11 C. B. N. S. 429; 31 L. J. C. P. 106; 8 Jur. N. S. 746; 5 L. T. 427; 10 W. R. 89.

A master is not responsible for an injury occasioned to a servant by tackle defective through the neglect of a fellow-servant, if there is no negligence or want of care on the part of the master, either as respects the providing of proper machinery or the competency of the servant.

Notes.—Reference may also be made to *Potts v. Plunkett* (1859), 9 Ir. C. L. R. 290, where the plaintiff was injured in consequence of standing upon a flagstone which broke. It was held that the defendants were not liable, the workman having acted rashly and the master not having been negligent. See also *Seymour v. Maddox* (1851), 20 L. J. Q. B. 327, where an actor was injured through falling through an unfenced hole in a floor over which he had to pass to reach the stage. It was held that the defendant was not liable (decided, however, on the pleadings).

3054.—*Watling v. Oastler* (1871), 40 L. J. Ex. 43; L. R. 6 Ex. 73; 23 L. T. 815; 19 W. R. 388.

A declaration by the administratrix of W. stating that the defendant was owner of a factory and machine, and W. was employed by him to work therein, and in the course of his employment it was necessary for him to enter the machine to clean it; that by the negligence of the defendant it was unsafely constructed and in a defective condition, and was, by reason of not being sufficiently guarded, unfit to be used and entered, as the defendant well knew; and by reason of the premises, and also by reason, as he well knew, of no sufficient apparatus having been provided by them to protect W., it was suddenly put in motion whilst he was at work in the machine, and he thereby sustained injuries from which he afterwards died, sufficiently shows that the machine was set in motion by the defendant's negligence, and it therefore discloses a cause of action, although there was no allegation that W. was ignorant of the dangerous and defective character of the machine.

Compare *Mellors v. Shaw* [3068].

3055.—*Hanrahan v. Ardnamult Steamship Co.* (1887), 22 L. R. Ir. 55

H., while in the employment of the defendant company as a second mate on board one of their steamers, sustained injuries, resulting in his death from the fall of a derrick while the vessel was discharging cargo. At the time the accident occurred the derrick was, in accordance with the usual custom, on the vessel, and for the discharge of the cargo, being hoisted from the deck to its proper place in the mast by a rope which worked through an iron bolt fixed

in a trestle-tree. The greater part of the bolt was concealed, and could not be examined without being drawn out of the trestle-tree. The bolt broke while the derrick was being hoisted, and it fell upon H. In an action by H.'s widow, under Lord Campbell's Act, it was proved that the bolt, to the extent of two-thirds of its thickness, was in a defective state and incapable of bearing a strain, and it was the common case of both parties that there was no skilled person on board whose duty it was to examine the screws and bolts. It was not shown that the defendants or their officers were in fact aware of the defective condition of the bolt, and no evidence was given as to the usual practice of inspection of vessels of the class, or for what time a bolt of the kind in question would in the ordinary course remain in repair and adequate to its work.

HELD—that there was no evidence of negligence on the part of the defendant company, and that the judge at the trial was right in directing a verdict for them.

Per Palles, C.B. : Firstly it was the defendants' duty to use due care that a reasonably fit and proper bolt should be provided and maintained ; but, secondly, it was the plaintiff's duty to establish a state of facts from which a jury may conclude, by reasonable inference that there was a breach of this duty, viz., not that the bolt was in bad repair, but that the defendants did not use due care to maintain it in repair.

3056.—Mansfield v. Baddeley (1876), 34 L. T. 696.

The plaintiff was employed by the defendant as a dressmaker. It was no part of her duty to go down into the kitchen, but on one occasion she went there, at the request of the defendant, to fetch something up. As she was leaving the kitchen a savage dog, which was generally tied up, rushed from under the table and bit her leg. The plaintiff was aware that a dog of this kind was kept on the premises. The judge at the trial nonsuited the plaintiff on the ground that as she was a servant, and knew the disposition of the dog, no action was maintainable.

HELD—that the nonsuit was wrong, inasmuch as the risk was not incidental to the service, and that there was evidence to go to the jury of the liability of the defendant for the injury sustained by the plaintiff.

3057.—Vose v. Lancashire and Yorkshire Railway (1853), 2 H. & N. 728 ; 27 L. J. Ex. 249 ; 4 Jur. N. S. 364 ; 6 W. R. 295.

Where a workman in the employ of one railway company was engaged in repairing their carriages upon a siding belonging to another company, but in the joint occupation of both companies, and he was placed between carriages, so that he could not see what might be coming, and was necessarily making a noise at his work so that he could not hear, and an engine belonging to the other company came up into the siding, and drove the carriages together, so that he was crushed between them and killed, and the jury found that the company to whom the engine belonged was guilty of negligence,

by reason that their rails were defective, and that neither the deceased was nor his fellow servants were so :

HELD—that his representatives could maintain an action against that company for compensation.

3058.—Carny v. Caledonian Railway Co. (1889), 16 R. 618.

The workman was killed by being run over by a train whilst working at a busy siding. The engine driver did not see him because he was watching the signals. The workman did not hear the train because of the general noise.

HELD—company liable, since they should have taken precautions to avoid such accidents.

3059.—Ormond v. Holland (1858), El. Bl. & El. 102.

A master is responsible to his servant for an injury received in the course of his service, if it is shown to have been occasioned by the personal negligence of the master. Such negligence may be brought home to the master, by showing either his personal interference to be the cause of the accident, or that he negligently retained incompetent servants whose incompetency was the cause of the accident ; but, in the absence of a special contract, the master is not liable for an accident not proved to have been occasioned by his personal negligence.

3060.—Ashworth v. Stanwix (1861), 3 El. & El. 701 ; 30 L. J. Q. B. 183 ; 7 Jur. N. S. 467 ; 4 L. T. 85.

The principle that a servant sustaining an injury from the negligence of a fellow-servant while engaged in the common employment cannot recover in an action against the common master does not exempt from liability a master who himself takes part in the servant's work, and whilst so doing injures the servant through negligence.

3061.—Brown v. Accrington Cotton Spinning and Manufacturing Co. (1865), 3 H. & C. 511 ; 34 L. J. Ex. 208 ; 13 L. T. 94.

A workman cannot recover damages from his employers for injury sustained by him while at work in their mill, and resulting from the building having been originally negligently constructed, unless personal negligence is proved against his employers themselves (or against some person acting by their orders), either in having given directions how the building should be constructed, or in having knowingly entrusted the execution of the work to an incompetent person.

3062.—Wigmore v. Jay (1850), 5 Ex. 354 ; 19 L. J. Ex. 296 ; 14 Jur. 837.

A master builder, having contracted to build a certain building, employed A. as a bricklayer. The scaffolding was erected under the superintendence of the master's foreman, he not being present, and

was constructed by men in his employ, who used an unsound ledger pole, in consequence of which the scaffold broke while A. was at work upon it, and he was thrown to the ground and killed. The unsoundness of the pole had been previously pointed out to the foreman.

HELD—that no action could be maintained against the master builder, there being no evidence that the foreman was an improper person to employ for that purpose.

3063.—Smyly v. Glasgow and Londonderry Steam Packet Co. (1868), 16 W. R. 483.

A master cannot be rendered liable on the ground of negligence by showing that the work was essential to the safety of a ship on which the servant was employed by the master, and that he permitted the ship to leave port without its being done, and without having on board a skilled machinist to do it, and that it was outside the scope of the servant's employment, and that he was unfit to do it, unless it is also shown that the work was dangerous, and that the master knew or ought to know that it was so.

The court will not take judicial notice that it is a dangerous work to oil machinery.

3064.—Ogden v. Rummens (1863), 3 F. & F. 751.

In an action by a widow of a labouring man, who had been employed, with others, by the defendant, to shore up an arch, which had sunk, and was killed by its falling upon him :

HELD—that the question was not as to the original construction of the arch, but as to the knowledge of the danger at the time of the accident, and whether the defendant had any better means of knowing of it than the deceased ; and if not, then the jury should find for the defendant.

3065.—Roberts v. Smith (1857), 2 H. & N. 213 ; 26 L. J. Ex. 319 ; 3 Jur. N. S. 469 ; 5 W. R. 581—Ex. Ch.

Where a master builder personally interferes, and directs his workmen to make a scaffolding out of poles which he knows to be unsound, he is liable to make compensation if the scaffolding gives way, and a workman upon it, in his employ, who has notice of the unsoundness, is injured thereby.

A master builder, being engaged to repair a house, employed one of his workmen, A., to erect the scaffolding for that purpose. A. knew how to build scaffoldings. The materials which were supplied to him by the builder were in bad condition. The workman broke several of the putlogs (the pieces of wood between the wall and the upright poles), but was ordered by the builder not to break any more, as they would do very well. The scaffolding having been erected by A. of the materials which were furnished to him, an accident happened to another workman, B., in consequence of the bad condition of the putlogs.

HELD (in an action by B. against the builder, to recover compensation for the injuries received)—that there was evidence to go to the

jury in support of B.'s case, and that such evidence ought to have been left to the jury.

3066.—*Williams v. Clough* (1858), 3 H. & N. 258 ; 27 L. J. Ex. 325.

A declaration stated that the defendant was possessed of a granary, and a ladder leading up to it ; that the ladder was wholly unfit and unsafe for use ; that the plaintiff was a servant for hire of the defendant ; that the defendant, knowing the premises, wrongfully and deceitfully ordered the plaintiff to carry corn up the ladder into the granary ; that the plaintiff, believing the ladder to be fit for use, and not knowing the contrary, did carry corn up the ladder into the granary, and by reason of the ladder being unsafe he fell from it.

HELD—that the declaration, without an averment that the plaintiff had no notice that the ladder was unsafe, was sufficient.

Per Bramwell, B. : A master cannot be held liable for an accident to his servant while using machinery in his employment, simply because the master knows that such machinery is unsafe, if the servant has the same means of knowledge as the master.

3067.—*Clarke v. Holmes* (1862), 7 H. & N. 937 ; 31 L. J. Ex. 356 ; 8 Jur. N. S. 992 ; 10 W. R. 405—Ex. Ch.

The plaintiff was employed by the defendant to oil dangerous machinery. At the time the plaintiff entered upon the service the machinery was fenced, but the fencing became broken by accident. The plaintiff complained of the dangerous state of the machinery, and the defendant promised him that the fencing should be restored. The plaintiff, without any negligence on his part, was severely injured in consequence of the machinery remaining unfenced.

HELD—that the defendant was liable for the injury.

Per Cockburn, C.J. : There is a sound distinction between the case of a servant who knowingly enters into a contract to work on defective machinery, and that of one, who, on a temporary defect arising, is induced by the master, after the defect has been brought to the knowledge of the latter, to continue to perform his service under a promise that the defect shall be remedied. In the latter case the servant does not waive his right to hold the master responsible for any injury which may arise from the omission of the master to fulfil his obligation.

Bartonshill Coal Co. v. Reid [3002] referred to ; see also *Smith v. Baker* [3075].

3068.—*Mellors v. Shaw* (1861), 1 B. & S. 437 ; 30 L. J. Q. B. 333 ; 7 Jur. N. S. 845 ; 9 W. R. 748.

Where a master of a coal-mine authorised his workmen to use the shaft while it was in an unsafe condition to his knowledge, and an injury resulted therefrom to one of the workmen who was using the shaft without knowledge of the danger.

HELD—that the master was liable for personal negligence.

HELD ALSO—that where one of two partners in a coal-mine acts

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as manager, and is guilty of personal negligence, his co-partner is jointly liable for the injury resulting from such negligence.

Notes.—*Roberts v. Smith* [3065]; *Tarrant v. Webb* [2991]; *Ormond v. Holland* [3059]; *Ashworth v. Stanwix* [3060], referred to.

3069.—*Webb v. Rennie* (1865), 4 F. & F. 608.

In an action by a labourer against his employers for an injury caused by the fall of a scaffold-pole proved to have fallen through the rottenness of the end put into the earth, it appeared that it had been in the earth two years, and that though some poles might last as long without being rotten, others would not, and that no one was employed from time to time to take up the poles to see if they were sound.

HELD—that if the jury thought the pole was left in the ground an unreasonable time without examination, there was evidence of negligence to sustain the action.

A servant has a right to expect that he shall only be exposed to the ordinary risks of the employment, and that the machinery or apparatus about which he is employed shall be kept in a reasonable state of safety.

3070.—*Davies v. England* (1864), 33 L. J. Q. B. 321; 10 Jur. N. S. 1235.

A count alleged that one of the defendants was a contractor for the supply of beef to the navy, and the other his foreman, having the control and management of the supply of cattle, and of the slaughter of the same; that it was the duty of the defendants to take care that sound and healthy beasts should be supplied and slaughtered, and that none others should be supplied for the purpose; yet that they supplied and slaughtered diseased cattle, whereby the plaintiff, who was employed to cut up the carcasses of the cattle, became infected with the disease of the cattle. A second count alleged, that the defendants, by representing slaughtered carcasses of cattle to be sound, caused and procured the plaintiff to cut up the same; that the beasts were unsound and diseased, whereby he contracted the disease and was permanently injured.

HELD—that the counts were bad.

A third count stating that the defendants, well knowing that certain carcasses of slaughtered cattle were diseased and dangerous to persons cutting up the same, invited and employed the plaintiff, who was ignorant of the diseased state of the carcasses, to cut up the same; that he, not knowing the premises, did, on the invitation and request, and on the employment of the defendants, cut up the carcasses, whereby he became infected and was injured, is a good count.

3071.—*Bond v. Wilson & Sons* (1908), 24 T. L. R. 238—Div. Ct.

A servant of the defendants, who were cab proprietors, went out one night in December with his masters' cab. Later at night (about 11 p.m.) the horse and cab came home without the driver. There

was no indication of any accident having happened. The horse had on former occasions, when left unattended returned home by itself. One of the defendants, who saw the horse and cab return, went to a public-house in the neighbourhood to look for the driver, but found it closed, and he accordingly returned home. Next morning the driver was found in an unconscious condition, suffering from injuries which indicated that he had fallen from his seat on the cab, and he died in a week, his death being accelerated by exposure. In an action by his widow to recover damages for his death, the county court judge held that there was a duty upon the defendants, who were aware that a horse had returned without a driver, to institute a proper search or to make inquiries, and that they had neglected that duty. He accordingly awarded the plaintiff damages.

HELD—that, in the circumstances, there was no duty on the defendants to make a search for the driver, and they were entitled to judgment.

3072.—Stones v. Steiner & Co., [1908] W. N. 19—C. A.

It is not negligent merely to employ boys in a position in which, being mischievous, they may be injured.

3073.—Elliott v. Tempest (1888), 5 T. L. R. 154.

In an action under the Employers' Liability Act, 1880:

HELD—that it is not sufficient evidence of negligence so as to make the employer liable to show that the work was speeded up so that a workman failed to shout before tipping with the result that the plaintiff was injured by the contents of a barrow falling upon him.

3074.—Couch v. Steel (1854) 23 L. J. Q. B. 121.

A shipowner does not warrant that his ship is seaworthy.

III. Servant's own Negligence or Knowledge of Danger.

N.B.—Refer also to the cases collected sub tit. "Employers' Liability under the Employers' Liability Act, 1880," VI., pp. 1436 *et seq.*, *infra*.

3075.—Smith v. Baker, [1891] A. C. 325; 60 L. J. Q. B. 683; 65 L. T. 467; 40 W. R. 392; 55 J. P. 660—H. L. (E.).

The appellant, a workman in the employment of the respondents, was working in a railway cutting with hammer and drills, when a stone, fastened by a chain to another chain hanging from a crane which was being "jibbed" over his head, slipped from its fastenings, struck and seriously injured him. In the county court the jury found that the machinery used for lifting the stone was not reasonably fit for its purpose; that the omission to supply special means of warning when the stones were being "jibbed" was a defect in the "ways, works, machinery, and plant" within the Employers' Liability Act; that the employers were guilty of negligence, and that

the appellant was not guilty of contributory negligence; and they awarded £100 damages, for which the judge entered judgment for the plaintiff. The notice of appeal to the divisional court, and subsequently to the Court of Appeal, was based solely on the ground that the plaintiff had voluntarily undertaken the risk. The Court of Appeal decided in favour of the defendants both on this ground and also on the ground that there was no evidence of negligence.

HELD—that the appeal must be allowed on the ground that the appellant had not voluntarily undertaken the risk, and that it was not competent to the house to enter into the question of negligence, as the point was not taken in the county court.

HELD ALSO—that there was negligence in that the machinery was not reasonably fit for its purpose, and no special warning was supplied to the men imperilled by the operation.

A person who relies on the maxim *Volenti non fit injuria* must show a consent to the particular thing done, though such consent may be inferred from the course of conduct as well as expressed in terms; but mere knowledge of a risk does not necessarily involve consent. A negligent system or a negligent mode of using perfectly sound machinery may make the employer liable, quite apart from the Employers' Liability Act.

The maxim *Volenti non fit injuria* explained and illustrated.

The contract between employer and employed involves on the part of the former the duty of taking reasonable care to provide proper appliances and to maintain them in a proper condition, and so to carry on his operations as not to subject those employed by him to unnecessary risk.

3076.—*Robertson v. Primrose & Co.*, [1910] S. C. 111; 47 Sc. L. R. 147—Ct. of Sess.

In an action of damages for personal injuries at the instance of a workman against his employers the pursuer averred that on a date specified, while at work as an iron-moulder, an occupation which necessitated his working in a stooping position, he was struck on the head by the chain block of a crane; that on a subsequent date, having remained in the same employment, he was again struck on the head by the chain block of the crane; that the crane was very much off the plumb and only remained stationary at the point of equilibrium; that on both occasions when the pursuer was struck it was moving back to that point from the place where it had been used; that the defenders were aware of its defective condition; and that it was a source of danger to anyone whose place of work was at or near the line of its orbit as it moved towards the point of equilibrium.

HELD—that the pursuer could not be presumed to have undertaken the risk of the defective condition of the crane, that not being an ordinary risk incidental to his employment, and consequently that, *quoad* both the occasions specified, issues must be allowed.

Smith v. Baker [3075] applied; *Wallace v. Culter Paper Mills Co.* [3209] followed.

3077.—Williams v. Birmingham Battery and Metal Co. (1899), 2 Q. B. 338.

A workman slipped while descending from an elevated tramway belonging to his employers. He fell, receiving injuries which caused his death. The employers had provided no safe way of descending. The jury found (1) that the defendants had not exercised due care to have the tramway in a safe and proper condition so as to protect their servants working upon it against unnecessary risks; (2) that it was dangerous to descend from the tramway without a ladder; (3) that the deceased had the same means of knowing that it was dangerous as the defendants had; (4) that the deceased did know that it was dangerous.

HELD—that, in the absence of any finding of the jury that the deceased had undertaken the risk of descending from the tramway without a ladder or other safe means of descent, the plaintiff was entitled to judgment upon the above findings.

Notes.—*Griffiths v. London and St. Katharine Dock Co.*, 13 Q. B. D. 259 [3081], distinguished on the ground that there the appliances were originally sufficient, but subsequently became insufficient, while here they were never sufficient. *Smith v. Baker* [3075] followed. *Mellors v. Stanley*, 1 B. & S. 437, referred to. Reference may also be made to *Pyner v. Bullard* (1897), 14 T. L. R. 57.

3078.—Senior v. Ward (1859), 1 El. & El. 385; 28 L. J. Q. B. 139; 5 Jur. N. S. 172; 7 W. R. 261.

When a servant is injured or killed, while in the employ of his master, by an accident resulting from the habitual negligence of his fellow-servants, known to and acquiesced in by the master, the master is not liable to an action by the servant, or, if killed, by his representative, if the servant has by his own negligence at the time, in knowing and disregarding the danger, materially contributed to the accident. Unless there is such contributory negligence by the servant, the master is liable.

3079.—Dyner or Dyman v. Leach (1857), 26 L. J. Ex. 221; 5 W. R. 490.

Where an injury happens to a servant while in the actual use of an instrument, an engine, or a machine, in the course of his employment, of the nature of which he is as much aware as his master, and the use of which is therefore the proximate cause of the injury, he cannot, at all events if the evidence is consistent with his own negligence in the use of it being the real cause, nor, in case of his dying from the injury, can his representative, recover against his master, there being no evidence that the injury arose through the personal negligence of his master; nor is it any evidence of such personal negligence of the master that he has in use in his works an engine or a machine less safe than some other which is in general use.

Therefore, where a labourer was killed through the fall of a

weight which he was raising by means of an engine to which he attached it by fastening on it a clip, and the clip had slipped off it:

HELD—that there was no case to go to the jury in an action by his representative against the master, although it appeared that another and safer mode of raising the weight was usual, and had been discarded by the orders of the master.

Patterson v. Wallace [3045] distinguished.

3080.—*Brooks v. Courtney* (1869), 20 L. T. 440.

If a party, whether a servant or not, undertakes an employment which involves danger of accident, and an accident occur, he cannot sue his employer for damages, although such accident might have been avoided by additional care on the part of the master.

Indermaur v. Dames, L. R. 2 C. P. 311, distinguished on the ground that the plaintiff was well aware of the danger.

3081.—*Griffiths v. London and St. Katharine Dock Co.* (1884), 53 L. J. Q. B. 504; 13 Q. B. D. 259; 51 L. T. 533; 33 W. R. 35; 49 J. P. 100—C. A.

In an action of negligence brought by a servant against his master for personal injury resulting from the unsafe state of the premises upon which the servant was employed, the statement of claim must allege not only that the master knew, but that the servant was ignorant of the danger.

3082.—*Thrussell v. Handyside* (1888), 57 L. J. Q. B. 347; 20 Q. B. D. 359; 58 L. T. 344; 52 J. P. 279.

The plaintiff was a workman, who was directed by his employer to work in a particular place. The defendants were contractors engaged in work above the place where the plaintiff was working. The defendants' work was of such a nature as to be dangerous to persons working below unless proper precautions were taken for their safety. The plaintiff was aware of the danger. The plaintiff, while working where he was directed by his employer, was injured by a piece of iron dropped by the defendants' workmen, and brought an action to recover damages for the injury. The jury found that the defendants had been guilty of negligence in not taking proper precautions for those below, that there was no contributory negligence on the part of the plaintiff, and that the plaintiff did not voluntarily incur the risk.

HELD—that the case was rightly left to the jury; that although the plaintiff was aware of the danger, yet, as he was compelled by the orders of his employer to work where he was working when the accident happened, the maxim "*Volenti non fit injuria*" did not apply, and he was entitled to recover.

Notes.—*Woodley v. Metropolitan District Railway* [3086] was distinguished. There is a duty imposed on the defendant to use care. The rule is stated in *Heaven v. Pender*, 52 L. J. R. Q. B. 702. "Whenever one person is by circumstances placed in such a position with

regard to another that anyone of ordinary sense who did think would at once recognise that if he did not use ordinary care and skill in his own conduct with regard to these circumstances, he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger."

Whether the plaintiff took the risk upon himself is a question for the jury (*Yarmouth v. France*, L. R. 19 Q. B. D. 647 [3216]).

The maxim "*Volenti non fit injuria*" only applies where the plaintiff wilfully incurs the risk. "*Scienti*," as was pointed out in *Thomas v. Quartermaine*, 55 L. J. R. Q. B. 439 [3207], and *Yarmouth v. France* is not equivalent to "*volenti*."

3083.—Holmes v. Worthington (1861), 2 F. & F. 533.

When a servant, knowing of a defect in machinery which he has to work in his master's employ, complains of it to him, but continues in the use of it in the reasonable expectation of its being repaired, and an accident happens through its defective condition, he is not precluded from recovering against his master.

3084.—Smith v. Dowell (1862), 3 F. & F. 238. S. P., Holmes v. Clarke (1861), 6 H. & N. 349; 7 H. & N. 937; 30 L. J. Ex. 135; 31 L. J. Ex. 356; 3 L. T. 675.

Where work is being carried on part of which is unsafe without certain precautions which the employer promises to provide, and he goes away leaving general directions to get on with the work, and in his absence the dangerous work is carried on before the precautions have been taken, and an injury results to a workman engaged on another part of the work while knowing of the danger, the latter cannot recover against the employer.

3085.—Skipp v. Eastern Counties Railway (1853), 9 Ex. 223; 2 C. L. R. 185; 23 L. J. Ex. 23.

A., who was in the employ of a railway company, his duty being to attach carriages of the luggage trains to the locomotive engine, was thrown under the carriages, and severely injured. There was evidence that the company's staff for the performance of this work was not sufficient; but A. had been employed in this particular service for several months prior to the accident, and had not made any complaint on the subject to the company.

HELD—that the company was not liable.

In such circumstances, it is not a question for the jury whether the number of servants employed by the company is sufficient for the performance of the work.

3086.—Woodley v. Metropolitan District Railway (1877), 46 L. J. Ex. 521; 2 Ex. D. 384; 36 L. T. 419—C. A.

A railway company employed a contractor to do work upon a side wall of a dark tunnel at a point where the line was on a curve, so that workmen could not see a train approaching till it was within

twenty or thirty yards of them. The space between the rail and the wall was just sufficient for a workman to keep clear of a train if sensible of its approach. Trains passed the spot every ten minutes, and when a train passed on the further line the noise would prevent a workman from hearing the approach of a train upon the line nearest to him. There was no light at the spot in question; no one was stationed to give notice of an approaching train, nor was the speed of trains slackened on approaching the spot, nor was any signal given by whistling or otherwise. The plaintiff was a workman in the service of the contractor so employed, and had been working in the tunnel, though not at precisely the same spot, for a fortnight, when he was struck by a train while reaching across the rails to find a tool which he had laid upon the ground. The jury found that there was negligence on the part of the company in not providing a look-out man or altering the usual mode of conduct in the traffic.

HELD—that the plaintiff, having continued the work with full knowledge of its dangerous nature, had no remedy against the company.

Per Mellish, L.J., and Baggallay, J.A.: The plaintiff not being the servant of the company there was no contract to modify his right to recover against the company if, while lawfully upon their premises, he was injured through want of reasonable precautions on their part. Further, that being entitled to protection from the company against unreasonable risk, the fact that he continued to work after he was aware of the risk, would not disentitle him to recover damages if injured by the neglect of the company to afford him such protection.

3087.—Saxton v. Hawksworth (1872), 26 L. T. 851—Ex. Ch.

S. was a sheet-roller in the service of the defendants at their steel works, and had been so for three years. Five steam engines properly constructed were used in the factory. Some stood at a distance from the other, but two men only were employed to attend to them all, as S. always well knew. During the necessary absence of both the engine tenters, without negligence on their part, an engine ran away, or revolved too fast, and caused a drum connected with it to fly to pieces, one of which, passing through a yard, entered the mill where S. worked, and hurt him. The runaway engine might have been stopped in time to prevent mischief if an attendant had been near it.

HELD—that S., being aware of the dangers incidental to his employment, contracted to take the risks, and therefore could not recover compensation for the injuries against the defendants.

Skipp v. Eastern Counties Railway [3085] approved.

3088.—Alsop or Assop v. Yates (1858), 2 H. & N. 768; 27 L. J. Ex. 156.

A declaration against a master alleged that he knowingly, carelessly, and negligently erected a hoarding in a street, and left a machine in a position in which it was likely to cause danger to the

workmen, and that a cart accidentally ran against the hoarding, and knocked down the machine against the plaintiff. The hoarding, which had been erected by the defendant, a builder, projected too far into the street, but sufficient room was left for carts to pass; a heavy machine was placed inside the hoarding, and close to it. A cart in passing struck against the hoarding, and knocked down the machine against the plaintiff, a workman employed by the defendant. The plaintiff had previously made some complaint of the position of the machine to his master, but voluntarily continued to work, though the machine was not moved.

HELD—that there was no evidence to go to the jury of the master's liability.

3089.—Griffiths v. Gidlow (1858), 3 H. & N. 648; 27 L. J. Ex. 404.

A workman employed with others in sinking a pit, being at the bottom, was injured by the fall of a tub of water, which was being drawn up by machinery. Evidence was given that the tackle was imperfect, not being pulled with a safe hook, and that a jiddy should have been used. He worked with the hook, making no complaint of it; a jiddy had been provided by the master, who had directed that it should be used when earth was raised. In his master's presence he had complained that the jiddy was not used for water. The master was at the workings several times each day.

HELD—that the master was not liable, first, because, assuming the injury to have arisen from the defect of the hook, the workman himself voluntarily used it, and it was not shown that the injury was not caused by his own rashness.

3089a.—Young v. Hoffman Manufacturing Co. [1907] 2 K. B. 646.
S. P. Cribb v. Kynock (No. 1) [1907] 2 K. B. 548.

Where a master employs an inexperienced workman upon dangerous machinery it is his duty to instruct and caution him; but the master may delegate the duty to a competent person, and, if he does so, he will not be liable for an injury to the workman resulting from the negligence of the delegate in not properly instructing or cautioning him. There is no difference in this respect between an adult and infant workman.

Notes.—Compare *Greenwood v. Greenwood* [3133]

APPENDIX B.

EMPLOYER'S LIABILITY.

B. Under The Employers' Liability Act, 1880.

As we have seen, at common law a master is liable for injuries sustained by his servants in the course of their employment, if such injuries were caused by any tortious act on the part of the master or his servants, save that the servant may be debarred from recovering in consequence of his contributory negligence or in consequence of his having consented to run the risk, *i.e.*, in consequence of the maxim *Volenti non fit injuria* applying. We have treated the doctrine of common employment as being an application of this maxim. In *Weblin v. Ballard* [3198], Smith, J., however, stated that the master, at common law, had three lines of defence: (1) traverse negligence or allege contributory negligence; (2) raise the defence of common employment; (3) raise the defence that the servant had contracted to take upon himself the known risks of the employment. We have now to consider in what ways the Act of 1880 has altered the position. Briefly stated, the position is as follows:—

I. The Act only applies to “workmen” not to servants. By s. 8 of the Act of 1880 “workman” is defined as meaning a railway servant and any person to whom the Employers and Workmen Act, 1875, applies. No one else, therefore, comes within the Act of 1880 (see Esher, M.R., in *Morgan v. L. G. O.* [3090]). By the earlier Act the following are included in the class known as “workmen”: labourers, servants in husbandry, journeymen, artificers, handicraftsmen, miners, or persons “otherwise engaged in manual labour.” Seamen are expressly excluded. To this list the Act of 1880 adds railway servants. With that addition the list is complete. As regards other workers, their position is in no way affected by the Act of 1880. We first consider, therefore, in the cases which follow the question “Who is a workman?” We merely add here that whether a person is a workman or not within the meaning of the Act is a question of mixed law and fact (see *Pearce v. Lansdowne* [3099]).

II. In virtue of s. 1 of the Act the defendant must be the employer of the workman. That is to say that the relationship of employer and workman (not, we suggest, master and servant) must exist. As to what will constitute this relationship, refer to *Wild v. Waygood* [3107]. From this case it will be seen that it is unnecessary for there to be any contract of service between the parties. But the workman employed by an independent contractor is not in this relationship as regards the principal (see *Fitzpatrick v. Evans* [3110]).

III. The Act only applies to certain causes of personal injury. Sect. 1 of the Act states these causes as follows :—

- “(1) By reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the employer ; or
- “(2) By reason of the negligence of any person in the service of the employer who has any superintendence entrusted to him whilst in the exercise of such superintendence ; or
- “(3) By reason of the negligence of any person in the service of the employer to whose orders or directions the workmen at the time of the injury was bound to conform, and did conform, where such injury resulted from his having so conformed ; or
- “(4) By reason of the act or omission of any person in the service of the employer done or made in obedience to the rules or byelaws of the employer, or in obedience to particular instructions given by any person delegated with the authority of the employer in that behalf ; or
- “(5) By reason of the negligence of any person in the service of the employer who has the charge or control of any signal, points, locomotive engine, or train upon a railway.”

If any of these causes appear then the workman (or his personal representatives or dependants in case of death) can recover as if he were a stranger to the master. That is to say in these cases, and no others, the doctrine of common employment cannot be pleaded by the employer, and the workman's rights are no greater than and no less (save as limited, *infra*, IV.) than the rights of one stranger who has been injured by the tort of another. If these causes do not apply then the position of the workman is the same as it was at common law.

IV. Although the causes mentioned in III., *supra*, apply as we have seen, the workman's rights are no greater than one stranger's rights against another. Therefore absence of negligence on the part of the employer or his servants, or presence of contributory negligence on the part of the workman is a defence under the Act as at common law. Thus the workman's rights are no *greater* than the rights of a stranger, but in one direction they are *less*.

In the words of Smith, J., in *Weblin v. Ballard* [3198] “. . . the legislature . . . has given him [the employer] a statutory defence under s. 2, sub-s. 3, which theretofore did not exist. It is this : the employer, when sued for a defect in the ways, plant or machinery [or any other of the above-mentioned causes] may set up that the servant knew of the defect [or negligence] and did not communicate it to him, the employer, or to some other person superior to himself in the service of the employer.” The reader will remember that a reply (and the only reply) to this defence is that the *workman was aware* that the employer or superior *already knew* of the defect or negligence.

V. The employer and workman may contract out of the Act (see *Griffiths v. Dudley (Earl)* [3222]; *Clements v. London and North-Western Railway* [3223]).

VI. Notice of injury must be given within six weeks of the accident (save in the case of death want of such notice will be no bar to action if the judge is of opinion that there was reasonable excuse for such want of notice) (see s. 4 of the Act). By s. 7 it is provided that :—

“ Notice in respect of an injury under this Act shall give the name and address of the person injured, and shall state in ordinary language the cause of the injury and the date at which it was sustained, and shall be served on the employer, or, if there is more than one employer, upon one of such employers.

“ The notice may be served by delivering the same to or at the residence or place of business of the person on whom it is to be served.

“ The notice may also be served by post by a registered letter addressed to the person on whom it is to be served at his last known place of residence or place of business ; and, if served by post, shall be deemed to have been served at the time when a letter containing the same would be delivered in the ordinary course of post ; and, in proving the service of such notice, it shall be sufficient to prove that the notice was properly addressed and registered.

“ Where the employer is a body of persons corporate or unincorporate, the notice shall be served by delivering the same at or by sending it by post in a registered letter addressed to the office, or, if there be more than one office, any one of the offices of such body.

“ A notice under this section shall not be deemed invalid by reason of any defect or inaccuracy therein, unless the judge who tries the action arising from the injury mentioned in the notice shall be of opinion that the defendant in the action is prejudiced in his defence by such defect or inaccuracy, and that the defect or inaccuracy was for the purpose of misleading.”

Cases on the above section have decided that the notice must be in writing (*Moyle v. Jenkins* [3224]) ; the writing must contain all the information above enumerated save that it will not be deemed invalid because of a defect or inaccuracy which does not prejudice the other side (*semble*, unless there was an intention to deceive) (*Keen v. Millwall Dock Co.* [3225] ; *Previdi v. Gatti* [3226]). The omission of the date is such a “ defect or inaccuracy ” (*Carter v. Drysdale* [3228]). In the later case of *Beckett v. Manchester Corporation* [3230], it was held not to be fatal to omit the date and address. And see Field, J.'s, *dictum* in that case, *infra*. Generally it may be said that unless the defect puts the other side in a disadvantage (or is intentional) it will not invalidate the notice (see cases above-mentioned, and *Stone v. Hyde* [3227] ; *Clarkson v. Musgrave* [3231]).

VII. Action must be brought within six months from the occurrence of the accident, or, in case of death, within twelve months from the time of death (see s. 4).

VIII. The amount recoverable is limited. Sect. 3 provides as follows :—

“ The amount of compensation recoverable under this Act shall not exceed such sum as may be found to be equivalent to the

estimated *earnings*, during the three years preceding the injury, of a person in the same grade employed during those years in the like employment and in the district in which the workman is employed at the time of the injury."

N.B.—"Earnings" include payments in kind capable of accurate estimation (but not otherwise) (*Noel v. Redruth Foundry* [3249]). The Act gives a *limit* not a *measure* of damages (see *Borlick v. Head* [3250]).

By s. 5 it is provided (in effect) that the workman (or those claiming through him) cannot recover a penalty in respect of the injury under another Act, and damages under the present Act (that is to say in calculating the damages the penalty so paid shall be deducted), nor if he (or they) has recovered under this Act can he recover the penalty. In this connection we remark that the liability of joint tortfeasors is joint and several, that is to say, if A. and B. commit a tort against C., C. can proceed against A. and B., or A. or B. But having elected he must stand by his election for he has but one cause of action and not as many causes as parties (see *Wright v. L. G. O.*, 2 Q. B. D. 271).

IX. All actions under the Act must be commenced in the county court. Sect. 6 provides as follows:—

"(1) Every action for recovery of compensation under this Act shall be brought in a county court, but may, upon the application of either plaintiff or defendant, be removed into a superior court *in like manner and upon the same conditions* as an action commenced in a county court may by law be removed.

"(2) Upon the trial of any such action in a county court before the judge without a jury one or more assessors may be appointed for the purpose of ascertaining the amount of compensation.

"(3) For the purpose of regulating the conditions and mode of appointment and remuneration of such assessors, and all matters of procedure relating to their duties, and also for the purpose of consolidating any actions under this Act in a county court, and otherwise preventing multiplicity of such actions, rules and regulations may be made, varied, and repealed from time to time in the same manner as rules and regulations for regulating the practice and procedure in other actions in county courts.

"'County court' shall, with respect to Scotland, mean the 'sheriff's court,' and shall, with respect to Ireland, mean the 'civil bill court.'

"In Scotland any action under this Act may be removed to the Court of Session at the instance of either party, in the manner provided by, and subject to the conditions prescribed by, section nine of the Sheriff Courts (Scotland) Act, 1877.

"In Scotland the sheriff may conjoin actions arising out of the same occurrence or cause of action, though at the instance of different parties and in respect of different injuries."

With these few remarks we pass to a consideration of the cases. The subject is divided up as follows:—

- I. Who are Workmen.
- II. The Relationship of Employer and Workman.
- III. The Five causes of Liability.

(a) Defects in the Condition of Ways, Works, Machinery or Plant.

- (1) "Way."
- (2) "Works."
- (3) "Machinery."
- (4) "Plant."

(b) Negligence of any Person, etc., having Superintendence, etc.

(c) Negligence of any Person, etc., to whose Orders the Workman was bound to and did Conform, etc.

(d) Acts or Omission of any Person, etc., in Obedience to Rules or Bye-laws, etc.

(e) Negligence of any Person, etc., having Charge, etc., of any Signal, etc.

IV. The Defence of Contributory Negligence.

V. The Defence of Knowledge of "Defect or Negligence."

VI. The Defence of Consent.

VII. Contracting Out.

VIII. Notice of Injury.

IX. Procedure—Assessment of Damage.

I. *Who are Workmen.*

Sect. 10, Employers' and Workmen Act, 1875, provides as follows :—

"The expression 'workman' does not include a domestic or menial servant, but, save as aforesaid, means any person, who being a labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner or otherwise engaged in manual labour, whether under the age of twenty-one years or above that age, has entered into or works under a contract with an employer, whether the contract be made before or after the passing of this Act, be expressed or implied, oral or in writing, and be a contract of service or a contract personally to execute any work or labour."

Sect. 13 of that Act provides as follows :—

"This Act shall not apply to seamen or to apprentices to the sea service."

Sect. 8 of the Act of 1880 provides as follows :—

"The expression 'workman' means a railway servant and any person to whom the Employers and Workmen Act, 1875, applies."

N.B.—Neither Act applies to servants of the Crown, since the Crown must be specifically named to be included (see *Attorney-General v. Hill*, 2 M. & W. 160).

3090.—*Morgan v. London General Omnibus Co.* (1884), 53 L. J. Q. B. 352; 13 Q. B. D. 832; 51 L. T. 213; 32 W. R. 759; 48 J. P. 503—C. A.

An omnibus conductor is not a "workman" or person "engaged in manual labour" within the meaning of s. 10 of the Employers and Workmen Act, 1875, and therefore is not entitled to the benefit of the Employers' Liability Act, 1880.

Per Brett (later Lord Esher), M.R. (at 13 Q. B. D., p. 833): "In the interpretation clause of both the Employers and Workmen Act, 1875, s. 10, and the Employers' Liability Act, 1880, s. 8, the word 'means' is used; this shows that the classes of persons mentioned and no others were intended to be comprehended within the operation of the Acts. The word 'otherwise' used in the earlier enactment shows that the statutes were intended to apply only to those engaged in manual labour; they do not extend to any others. The classes enumerated are 'labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or otherwise engaged in manual labour.' Let me test for a moment the meaning of these words; neither a carpenter, a bailiff, nor the clerk of a parish can be described as a 'labourer'; but a man employed to dig the ground is a 'servant in husbandry'; a stevedore may be a person 'engaged in manual labour.' As to the conductor of an omnibus, I cannot think that he falls within any of the classes enumerated; he is not 'engaged in manual labour,' he does not lift the passengers into and out of the omnibus; it is true he may help to change the horses, but his real and substantial business is to invite persons to enter the omnibus and to take and keep for his employers the money paid by the

passengers as their fare ; in fact, he earns the wages becoming due to him through the confidence reposed in his honesty."

Wilson v. Glasgow Tramways and Omnibus Co. [3092] disapproved.

3091.—Cook v. North Metropolitan Tramways Co. (1887), 56 L. J. Q. B. 309 ; 18 Q. B. D. 683 ; 56 L. T. 448 ; 57 L. T. 476 ; 35 W. R. 577 ; 51 J. P. 630.

The driver of a tramcar is not " a person to whom the Employers and Workmen Act, 1875, applies," and therefore is not entitled to the benefit of the Employers' Liability Act, 1880.

The term " workman " applies to those whose work is laborious and not mental. A driver is not within the meaning of the Act since he is not a " labourer, servant in husbandry, journeyman, artificer, handicraftsman or miner."

Morgan v. The L. G. O. Co. [3090] followed.

3092.—Wilson v. Glasgow Tramways and Omnibus Co., Ltd. (1878), 5 R. 981 ; 15 S. L. R. 656.

A tramway conductor is a workman within the meaning of s. 10 Employers and Workmen Act, 1875. See [3090].

3093.—Bound v. Lawrence, [1892] 1 Q. B. 226 ; 61 L. J. M. C. 21 ; 65 L. T. 844 ; 40 W. R. 1 ; 56 J. P. 118—C. A.

The test of whether an employee is engaged in manual labour, within the meaning of the Employers and Workmen Act, 1875, is—whether such labour is his real and substantial employment, or whether it is incidental and accessory to such employment. The appellant, a grocer's assistant, whose duty it was to serve customers in a shop, had also other duties involving manual labour, such as making up parcels for customers, carrying parcels from the shop to the cart at the door, and bringing up goods from the cellar to the shop.

HELD—that such occupations were incidental to his real and substantial employment as a salesman, and that he was not engaged in manual labour within the meaning of the Employers and Workmen Act, 1875.

Morgan v. The L. G. O. Co. [3090] approved.

3094.—Smith v. Associated Omnibus Co., [1907] 1 K. B. 916 ; 76 L. J. K. B. 574 ; 96 L. T. 675 ; 71 J. P. 239 ; 23 T. L. R. 381—D.

The plaintiff was in the employ of an omnibus company as the driver of a motor omnibus. According to the evidence his duty was not only to drive the omnibus, but also to start it by means of the starting handle after working the pump to get pressure up. Spanners and wrenches were supplied to him, and he was expected, if anything occurred on the road, to put it right if he could.

HELD—that on the evidence he was a workman within the definition of s. 10 of the Employers and Workmen Act, 1875, and

therefore entitled to the benefit of the Employers' Liability Act, 1880. The workman should be engaged in manual labour *ejusdem generis* with the classes of workmen mentioned in the section.

A person who is obliged to perform such work as that performed by the plaintiff, is engaged in work *ejusdem generis* with that of an artificer or a handicraftsman.

Cook v. North Metropolitan Tramways Co. [3091] distinguished.

3095.—*Rushbrook v. Grimsby Palace Theatre* (1909), 100 L. T. 253 ; 25 T. L. R. 258—C. A.

A person who was employed at a theatre as "stage manager," but whose principal duty it was to shift the furniture and scenes and to do rough stage carpentry, was held to be a "person engaged in manual labour," and consequently a "workman," within s. 8 of the Employers' Liability Act, 1880.

3096.—*Yarmouth v. France* (1890), 57 L. J. Q. B. 7 ; 19 Q. B. D. 647 ; 36 W. R. 281.

The driver of a cart in the employment of a wharfinger who, for the purposes of his business, is the owner of carts and horses, is a "workman" within the Act, at least, where it is shown that one of the duties of the employee was to load and unload the cart, since this occupation is clearly manual labour.

3097.—*Maynard v. Peter Robinson, Ltd.* (1903), 89 L. T. 136 ; 19 T. L. R. 492—D.

A sempstress who works at a sewing machine and heats irons on a stove and irons materials, is a person "engaged in manual labour" within the definition of "workman" in s. 10 of the Employers and Workmen Act, 1875, and therefore entitled to the benefit of the Employers' Liability Act, 1880.

3098.—*Reg. v. Louth Justices*, [1900] 2 Ir. R. 714.

A hairdresser is not a "workman" within the meaning of s. 10 of the Employers and Workmen Act, 1875.

3099.—*Pearce v. Lansdowne* (1893), 62 L. J. Q. B. 441 ; 69 L. T. 316 ; 57 J. P. 760.

Where the duties of a potman in a public-house, although manual, are substantially of a menial or domestic nature, he is not a workman within the Employers' Liability Act.

Although the facts of the case were admitted, yet it was the duty of the judge to leave to the jury the question whether the plaintiff was a workman and not a domestic servant.

Whether a person is a workman within the meaning of the Act is a question of mixed law and fact.

Notes.—The following have been held to be menial servants: gardener, *Johnson v. Blenkinsop*, 5 Jur. 870 ; head gardener, *Nowlan*

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v. Ablett, 2 Cr. M. & R. 5; huntsman, *Nicoll v. Greaves*, 33 L. J. C. P. 259.

3100.—*Jackson v. Hill* (1883), 48 J. P. 7.

J. agreed with H., a frilling manufacturer, to serve for seven years at £5 per week during the ordinary hours. He was described in the agreement as having a knowledge of mechanics, and to assist as a practical working mechanic in developing ideas. He in fact drew designs, and had workmen to assist in carrying them out.

HELD—that J. was a workman within the meaning of the Employers and Workmen Act, 1875. (But see the next case.)

3101.—*Jackson v. Hill* (1884), 13 Q. B. D. 618; 49 J. P. 118.

By an agreement in writing between H. & Co., manufacturers, and J., reciting that J. having a knowledge of mechanics, and H. & Co. requiring the services of a person having such knowledge “to assist the firm as a practical working mechanic in developing ideas they (the firm) might wish to carry out, and to himself originate and carry out ideas and inventions suitable to the business of such firm, if such inventions were approved by them,” it was mutually agreed that J. should be employed by the firm “for the purpose above specified.”

HELD—that J. was not “a mechanic or workman” within the Employers and Workmen Act, 1875, being engaged, substantially, as an inventor and not as a mechanic.

3102.—*Grainger v. Aynsley, Bromley v. Tams* (1881), 6 Q. B. D. 182.

A potter's printer paid by the piece and employing and paying assistants is a “workman” within the meaning of the Employers and Workmen Act, 1875.

3103.—*Macbeth v. Chislett*, [1910] A. C. 220; 79 L. J. K. B. 376; 102 L. T. 82; 54 S. J. 268; 26 T. L. R. 268—H. L. (E.).

In construing the meaning of a term in an Act of Parliament the court will not adopt an unnatural sense because in some Act which is not incorporated or referred to such an interpretation is given to it for the purposes of that Act alone.

In deciding whether or not a man is a “seaman” the court must see, first, whether he is by vocation a seafaring man, and, secondly, whether he is doing work in connection with that vocation.

The respondent, who had been, but had for years ceased to be, a seaman, was injured in assisting as a dock labourer in warping a ship across a dock.

HELD—that he was not a “seaman” for the purposes of the Employers' Liability Act, 1880, which excludes seamen, and was entitled to compensation as a “workman” under that Act.

3104.—*Corbett v. Pearce*, [1904] 2 K. B. 422; 73 L. J. K. B. 885; 90 L. T. 781; 68 J. P. 387; 20 T. L. R. 473—D.

The plaintiff was employed to assist in loading and unloading and in navigating a sprit-sail barge plying only on the Thames, though

capable of going coasting voyages, and registered as a British ship, the captain of the barge and the plaintiff being the only hands employed on the barge. In the course of his employment the plaintiff sustained personal injury.

HELD—that the plaintiff was a “seaman” within s. 13 of the Employers and Workmen Act, 1875, and not a “workman” within s. 10 of that Act, and s. 8 of the Employers' Liability Act, 1880, and therefore that he had not a right to compensation under the latter Act. Had the vessel not been a seagoing vessel the case might have been different.

3105.—Hanrahan v. Limerick S.S. Co. (1886), 18 L. R. Ir. 135.

Per Pales, C.B. (at p. 137) : “The Act [of 1880] excludes seamen. The employment of the deceased was as second mate, an employment outside the Act. The plaintiff, however, swears that he was also employed to superintend the discharge of the cargo. Part of the duty of a mate has reference to the superintendence of the discharge of cargo; and if the deceased had an employment separate and distinct from that of mate or seaman, it lay upon the plaintiff to prove it expressly and distinctly.”

Notes.—This was an application to move an action commenced in the Civil Bill Court into the Superior Court. The application was refused since it did not appear that the deceased (the employed) was a workman within the meaning of the Act.

3106.—Oakes v. Monkland Iron Co., Ltd. (1884), 11 R. 579; 21 S. L. R. 407.

A fireman on board a barge which plied exclusively upon a canal is not a “seaman” within the meaning of s. 13 of the Employers and Workmen Act, 1875, but a “workman” within the meaning of s. 10 of that Act.

II. *The Relationship of Employer and Workman.*

3107.—Wild v. Waygood, [1892] 1 Q. B. 783; 61 L. J. Q. B. 391; 66 L. T. 309; 40 W. R. 501; 56 J. P. 389—C. A.

Where a joiner, employed by a firm of lift contractors in the construction of a lift in a house in the course of erection, with the sanction of his employers borrowed a workman from a firm of builders engaged on the premises, it was held that the workman was in the service of the lift contractors.

The facts leading up to the accident were as follows: The joiner ordered the workman to put a plank across the well of the lift and stand upon it, and then started the lift, whereby the plank was upset, and the workman injured.

The workman sued the lift contractors under the Employers' Liability Act, and obtained a verdict.

HELD—that there was evidence to go to the jury, first, that the plaintiff was, at the time of the injury, a workman in the service of the defendants; secondly, that the order to stand upon the plank

was given by a person to whose orders the plaintiff was bound to conform; thirdly, that the injury resulted from the plaintiff having so conformed.

The second ground of decision in judgment of Lord Coleridge, C.J., in *Howard v. Bennett*, 58 L. J. R. Q. B. 129 [3181], overruled.

The negligence referred to in s. 1, sub-s. 3 of the Act, is not confined to negligence in the order itself; and in order to establish liability under that sub-section, it is not necessary that conformity to the order should be the *causa causans* of the injury, though, *semble*, there must be an intimate connection between the negligence, the injury, and the conformity to the order.

In order to establish it, it must be shown that the injury resulted or was caused "by reason of the negligence of a person in the service of the employer. To whose orders or directions the workman at the time of the injury was bound to conform, and did conform, where such injury resulted from his having so conformed."

The sub-section cannot be construed so rigidly that it is necessary to prove that the conformity to the order is the *causa causans* of the injury. The negligence must be the *causa causans* of the injury. Of course, there must be an intimate connection between the order, the negligence and the injury.

In this case there is the necessary connection between the order and the negligence.

There was the order to stand on the plank, which the plaintiff had to, and actually did obey, and there was the negligence in starting the lift.

If the order to stand on the plank had not been given, the starting of the lift would not have been negligent.

If there had been no negligent starting of the lift, after the plaintiff was on the plank, there would have been no accident. So it shows that there is an intimate connection between the three essential elements.

The case of *Millward v. The Midland Railway Co.* [3178] referred to.

3108.—*Littlejohn v. Brown*, [1909] S. C. 169—Ct. of Sess.

A firm of shipbuilders had riveting work done by squads of riveters, each squad consisting of two riveters, a holder on, and a boy who acted as rivet heater. The agreed-on price for the work was handed weekly to the head riveter, who paid a wage to the boy and divided the balance among the other members of the squad. The boy worked only to the orders of the riveters, and so long as the work was properly done the shipbuilders did not interfere with the squad in any way. As a general rule the boy was selected and engaged by the riveters and could be dismissed by them at pleasure. In an action at the instance of a rivet boy against the shipbuilders to recover damages under the Employers' Liability Act, 1880, for injuries sustained by him while in their employment through an accident alleged to be caused by defective plant, evidence was given of the above facts, and further that the pursuer had in this case been engaged by the riveters on the recommendation of the defenders' foreman. There was conflicting evidence as to whether the pursued

could have been dismissed without the consent of that foreman. The jury found for the pursuer.

HELD—that there was no evidence from which the jury could infer that the pursuer was in the service of the defenders, and that there must be a new trial.

3109.—Brown v. Butterley Coal Co. (1886), 53 L. T. 964; 50 J. P. 230.

The defendants were owners of a coal mine worked under the “butty” system. In mines so worked “butty” men contract with the owners of the mine to bring coal up at so much per ton, and for this purpose employ men under them. The deceased had been so employed, and had been killed by an explosion while working in the mine.

HELD—that the deceased had been a workman in the employ of the owners of the mine within the meaning of the Employers’ Liability Act, 1880, and that his wife would be entitled to damages if the case came within the terms of sub-s. 3 of s. 1 of that Act.

Notes.—*Morrison v. Baird & Co.*, 10 R. 271 [3112], approved.

3110.—Fitzpatrick v. Evans, [1902] 1 K. B. 505; 71 L. J. K. B. 302; 86 L. T. 141; 50 W. R. 290; 18 T. L. R. 290—C. A.

A workman employed by an independent contractor, who had contracted with the owners of a colliery to sink a shaft therein, signed the record book of the colliery containing the conditions of employment for all persons employed at the colliery directly or indirectly. The conditions provided that every workman employed by a contractor at the colliery should, in consideration of being employed at the colliery, be bound as between himself and the owners by the terms of the conditions. During the work of sinking an escape of gas occurred, which ignited and so burned the workman that he died. In an action by the legal personal representative of the workman under the Employers’ Liability Act, 1880, to recover compensation for his death, the contractor gave evidence that if the manager of the mine had given him an order relating to the work he would have obeyed and would have expected his workmen to obey it.

HELD—that there was no evidence to go to the jury that the deceased man was a “workman” in the service of the owners of the colliery within the meaning of s. 8 of the Employers’ Liability Act, 1880, and s. 10 of the Employers and Workmen Act, 1875.

Notes.—*Marrow v. Flimby and Broughton Moor Coal and Fire Brick Co.* [3111] followed. Distinguish *Brown v. Butterley Coal Co.* [3109].

3111.—Marrow v. Flimby and Broughton Moor Coal and Fire Brick Co., [1898] 2 Q. B. 588; 67 L. J. Q. B. 976; 79 L. T. 397; 14 T. L. R. 588—C. A.

The plaintiff’s husband was employed to work for him as a sinker by an independent contractor, who had contracted with the defendants, the owners of a coal mine, to sink a shaft for them in their

mine. The plaintiff's husband was killed while working in the mine. In an action by the plaintiff under the Employers' Liability Act, 1880, to recover damages in respect of the death of her husband.

HELD—that the statutory control given to the mine owner by the Coal Mines Regulation Act, 1887, and the rules thereunder, over persons working in the mine, for the purpose of enforcing the prescribed regulations for carrying on the mining operations without danger, did not alter the relationship between the contracting parties *inter se*, and consequently the plaintiff's husband was not a workman in the defendant's employment within the meaning of the Employers' Liability Act, 1880, and the plaintiff was not entitled to recover.

3112.—Morrison v. Baird & Co. (1882), 10 R. 271 ; 20 S. L. R. 185.

The defenders (lime quarry owners) were in the habit of arranging with certain of their men to excavate portions of the limestone at a certain rate per ton, and authorising them to employ the necessary workmen; one of such men was J. M. J. M. employed the pursuer as a workman. While so employed the pursuer was injured by the negligence of the defenders or their managers or J. M.

HELD—that the relationship of employer and workman existed between the defenders and the pursuer.

3113.—Nicolson v. Macandrew & Co. (1888), 15 R. 854.

In order for the pursuer to succeed in an action under the Employers' Liability Act, 1880, it is necessary to prove that the relation of employer and employed subsisted between the person injured and the person against whom the action is laid.

Where a mason's labourer proceeds under the Employer's Liability Act, 1880, against the principal contractor in respect of injuries received whilst fetching a shovel lent to another mason in consequence of scaffolding over which he passed giving way, it is necessary to allege that the scaffolding had been erected for the benefit of the masons, or that it had been used by them with the authority or sanction, or at the invitation of the defenders.

Notes.—*Brady v. Parker*, 14 R. 783, and *Indermaur v. Dames* L. R. 2 C. P. 311, distinguished.

3114.—Sweeney v. Duncan & Co. (1892), 19 R. 870 ; 29 S. L. R. 777.

The Employers' Liability Act, 1880, only has application where the relationship of employer and employee exists.

A firm of shipbuilders entered into a contract with F. to do work. F. was a fitter in the employment of the shipbuilders. F., to do the work, employed labourers of which the pursuer was one. Through F.'s negligence the pursuer was injured. The pursuer sought damages against the shipbuilders under the Employers' Liability Act, 1880, s. 1, sub-s. 3.

HELD—that the Act did not apply to the case as the pursuer had not been employed by the defenders.

III. *The Five Causes of Liability.*

(a) “*By reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the employer*” (s. 1, sub-s. 1).

But note : “A workman shall not be entitled under this Act to any right of compensation or remedy against the employer in any of the following cases ; that is to say,

“ (1) Under sub-section one of section one, unless the defect therein mentioned arose from, or had not been discovered or remedied owing to the negligence of the employer, or of some person in the service of the employer, and entrusted by him with the duty of seeing that the ways, works, machinery, or plant were in proper condition ” (s. 2, sub-s. 1).

(1) “*Way.*”

3115.—Robertson v. Linlithgow Oil Co. (1891), 18 R. 1221 ; 28 S. L. R. 863 ; S. P., **Pritchard v. Lang** (1889), 5 T. L. R. 639.

A defect in “ways” *per se* gives no right of action unless there is default on the part of the employer or his servants.

3116.—M’Inulty v. Primrose (1897), 24 R. 442 ; 34 S. L. R. 334 ; 4 S. L. T. 286.

A labourer while carrying a load of bricks up stairs in an unfinished house was injured in consequence of his foot going through a rotten stairboard. The stairs had been fixed a few days before by a contractor other than the labourer’s employer.

HELD—assuming there was a defect in a “way” there was no negligence on the part of the employer.

Notes.—Reference may be made in connection with this case to the case of *Macfarlane v. Thompson* (1884), 12 R. 232, where two earlier cases as to *onus* of proof in such cases were explained. See *Fraser v. Fraser*, 9 R. 896 [3154] and *Walker v. Olsen* (1882), 9 R. 946.

3117.—Jamieson v. Russell (1892), 19 R. 898.

Deceased, a workman, was killed by falling into an open tank when leaving his ship by the only exit available. He had to leave by a ladder which passed close to the tank. It was dark. The tank was usually protected.

HELD—plaintiff entitled to an issue, *i.e.*, could not be non-suited.

Notes.—Contrast with *Forsyth v. Ramage* [3145].

3118.—Willets v. Watt, [1892] 2 Q. B. 92 ; 61 L. J. Q. B. 540 ; 66 L. T. 818 ; 40 W. R. 497 ; 56 J. P. 772—C. A.

The plaintiff was employed as a steam-hammerman in the service of the defendants, a firm of engineers, upon whose premises was a

large covered workshop about 150 feet long and 50 feet wide, over the floor of which were scattered certain machinery and other appliances used in their business. Near the centre of the workshop was a well with a cover which had not been used for about seven years. The plaintiff, who worked at one end of the workshop, whilst walking across it to make some enquiry of a workman at the other end with regard to the steam-power, fell into the well, which had been uncovered by the defendant's foreman for the purpose of emptying water from an iron cylinder into it. There was no defined way where the plaintiff crossed, but he went the most direct line across the workshop. The defendant's workmen also used to pass up and down the workshop. No warning was given by the foreman that the well had been uncovered. In an action under the Employers' Liability Act, 1880, to recover damages for the injury sustained :

HELD—that the place where the accident happened was a "way" within s. 1 of the Act; that the accident was not caused by "any defect in the condition of the way" within sub-s. 1 of s. 1, but was caused by the negligence of the defendant's foreman in the user of the way within sub-s. 2 of s. 1.

Per Lord Esher, M.R. : A way may be defined as the course which a workman would in ordinary circumstances take in order to go from one part of a workshop or premises where a part of his employer's business is being done, to another part of the workshop or premises where another part of his employer's business is being done.

There could have been no defect in the "way," since the well had a lid, and there was no suggestion as to there being anything wrong with the lid. The omission to cover up the well was a negligent use of the way, and not a defect in the condition of the way.

3119.—McGiffin v. Palmer's Shipbuilding and Iron Co. (1883), 52 L. J. Q. B. 25; 10 Q. B. D. 1; 47 L. T. 346; 31 W. R. 118; 47 J. P. 70.

A defect in the condition of a way within the meaning of the Employers' Liability Act, 1880, s. 1, sub-s. 1, must be some defect or alteration in the permanent condition of the way itself; and obstacles lying on the way which do not in any degree alter the fitness for the purpose for which it is generally employed, and cannot be said to be incorporated with it, do not make it defective within the meaning of the section.

3120.—Pegram v. Dixon (1886), 55 L. J. Q. B. 447; 51 J. P. 198.

During the building of a house the workmen obtained access to the upper part by ladders placed in a well intended for a staircase. There was another well through the house intended for a lift, down which rubbish had been thrown during the building. Upon the staircase being completed, it was closed to the workmen as a means of access, and the ladders were transferred to the lift-well. No precautions had been taken to prevent workmen from throwing rubbish down the lift-well after the ladders had been so transferred. The plaintiff was ascending one of the ladders when a boy threw a plank

down from the third floor which struck the plaintiff and broke his collar-bone.

HELD—that this was not a “defect in the condition of the way” within the meaning of sub-s. 1 of s. 1 of the Act; and that the fact of no notice or warning being given to stop the practice of throwing materials down the lift-hole did not have the effect of bringing the case within that sub-section.

Notes.—*McGiffin v. Palmer's Shipbuilding, etc., Co.* [3119] referred to.

3121.—*Mitchell v. The Coats Iron and Steel Co.* (1885), 23 S. L. R. 108.

A brakesman on a locomotive engine was ordered by the engine-driver, whose orders he was bound to obey, to get off the engine while it was in motion and replace on the rails one of the waggons which had got off. The engine was used to draw waggons to an ironworks. The brakesman, obeying the order, stepped on the footboard of the engine. By the side of the line iron bars were piled so that one projected above the footboard, and in consequence the brakesman's foot was struck and he was injured.

HELD—(1) a defect in the “ways” within s. 1, sub-s. 1.

(2) Negligence in the driver, *i.e.*, a person in the service of the employer, to whose orders the workman was bound to conform within s. 1, sub-s. 3.

3122.—*Ferris v. Cowdenheath Coal Co.* (1897), 24 R. 615; 34 S. L. R. 492; 4 S. L. T. 335.

Where a manhole in a mine is blocked that amounts to a defect in a “way” within s. 1, sub-s. 1.

3123.—*Hughes v. Clyde Coal Co.* (1891), 19 R. 343; 29 S. L. R. 387.

Where there is only a distance of 47 yards between cross-roads in workings there is no need for man-holes, and the absence of the latter is not sufficient to show negligence on the part of the employer so as to make him liable under the Act of 1880.

3124.—*Bromley v. Cavendish* (1886), 2 T. L. R. 881.

Plaintiff had to pass over a hole where a weighing machine was being erected. She had to pass over on a plank. It was loose and tipped, and she was injured.

HELD—a defect in a “way” and defendant liable.

3125.—*Mitchell v. Holdsworth* (1883), 76 L. T. J. 101.

Plaintiff was killed while passing along a passage between a wall and machinery by being caught in the machinery. The space between wall and machinery was eleven inches.

HELD—a defect in a “way.”

Notes.—Contrast *Pritchard v. Long* (1889), 5 T. L. R. 639.

(2) "*Works*."

3126.—*Brannigan v. Robinson*, [1892] 1 Q. B. 344; 61 L. J. Q. B. 202; 66 L. T. 647; 56 J. P. 328.

The term "works" in s. 1, sub-s. 1, of the Employers' Liability Act, 1880, is not confined to factories, workshops, or permanent premises of an employer. A plot of ground, in the course of being cleared of old buildings in order to form a site for new buildings operations, is the "works" of the employer of labour who has contracted to clear it, and whose business it is to perform such contracts.

3127.—*Howe v. Finch* (1886), 17 Q. B. D. 187; 34 W. R. 593; 51 J. P. 276.

The expression "works" must be taken to mean works already completed, and not works in course of construction, which are on completion to be connected with or used in the business of the employer.

3128.—*M'Killop v. North British Railway Co.* (1896), 23 R. 768; 33 S. L. R. 586; 4 S. L. T. 25.

A railway company or other employer is not relieved, by the appointment of competent engineers and managers, from responsibility for injury arising to a servant from a defect in the construction of the works.

Notes.—Lord M. Laren's judgment (23 R. pp. 770 *et seq.*) contains some valuable observations on the cases of *Bartonshill Coal Co. v. M'Guire* (1858), 5 Macq. 300; *Wilson v. Merry and Cunningham* (1867), 5 Macph. 807 [2992]; *Wallace v. Culter Paper Mills Co.* (1892), 19 R. 915 [3210], all of which are relied upon.

3129.—*Moore v. Gimson* (1889), 58 L. J. Q. B. 169.

The plaintiff, a workman among others in the defendants' employ, was injured by the fall of a wall. The foreman of the works had observed that the wall was unsafe, and having placed the workmen out of danger, ordered a contractor employed in repairing the buildings at the time to bring his whole staff of workmen and shore up the wall. This was done, and the foreman, having been assured by the contractor that the wall was safe, sent the workmen back to their work. Shortly afterwards the wall fell. The foreman trusted to the assurance of the builder that the wall was safe, and did not personally inspect its condition after it had been shored up.

HELD—that there was no evidence of negligence on the part of the defendants or of their foreman, and that consequently s. 2, sub-s. 1, constituted a good defence to the action.

3130.—*Murray v. Merry and Cunningham* (1890), 17 R. 815; 27 S. L. R. 666.

A stone fell, killing the workman. It would (probably) not have fallen had fencing been fixed. It was not usual in the trade to fit

fencing and to have done so would have impeded the work (*semble*, to the extent of rendering it practically impossible).

HELD—an accident which the defenders, in the exercise of reasonable care, could not have been expected to foresee and provide against, and therefore there being no negligence there was no ground of action either at common law (Scots), or under the Act of 1880.

(3) “*Machinery.*”

3131.—Heske v. Samuelson (1883), 53 L. J. Q. B. 45 ; 12 Q. B. D. 30 ; 49 L. T. 474.

A defect in the condition of the machinery or plant of the employer within s. 1, sub-s. 1, of the Employers’ Liability Act, 1880, includes unsuitability of the machinery for the purpose for which it is used, and is not confined to cases where the machinery has become defective. Thus where a machine, though not defective in its construction was, under the circumstances in which it was used, calculated to cause injury to those using it it was held to be “defective.”

The deceased, a workman in the employment of the defendants, was killed by a piece of coke falling from a lift used at a blast furnace belonging to them. The lift consisted of two platforms which ascended and descended alternately, and at the time when the deceased was injured he was removing empty barrows from the platform which was at rest at the bottom of the lift. There was evidence that the accident arose either from the sides of the lift not being fenced so as to prevent coke from falling over, or from the lower platform not being roofed so as to protect those working on it from falling coke.

HELD—that under the circumstances there was a “defect in the condition” of the lift for which the defendants were liable.

3132.—Walsh v. Whiteley (1888), 57 L. J. Q. B. 586 ; 21 Q. B. D. 371 ; 36 W. R. 876 ; 53 J. P. 38—C. A.

The mere fact that a machine is dangerous to a workman employed to work with it does not show that there is a defect in the condition of the machine within the meaning of the Employers’ Liability Act, 1880, s. 1, sub-s. 1, inasmuch as by s. 2, sub-s. 1, of the Act, the only defects in respect of which the employer is liable are defects implying negligence of the employer or some one in his service intrusted by him with the duty of seeing that the machine is in proper condition. The Act is not directed against dangerous machines but against the negligence of employers.

The plaintiff in an action under the Employers’ Liability Act, 1880, was employed by the defendants to work at a carding machine. Part of the machine consisted of a wheel or pulley upon which, while in motion, the plaintiff had to place a band. The disc of the wheel had holes in it, and, while the plaintiff was putting on the band, his thumb slipped through one of these holes, the result being that it was caught between the wheel and the bed-plate of the machine and cut off. It was proved that, though these wheels were sometimes made without such holes, they were very commonly made with them,

the object being to reduce the weight of the wheel and consequent friction. In the defendant's mill there were machines of both sorts, and it did not appear that any complaint had previously arisen with regard to the wheels with holes, the plaintiff himself stating that he had never complained of the machine, because it had never entered into his head that it was dangerous.

HELD (Lord Esher, M.R., *diss.*)—that there was no evidence of any defect in the machine implying negligence in the defendants or anyone in their service, and therefore that the defendants were not liable.

Per Lord Esher, M.R. (*diss.*): "Machinery is defective within the meaning of s. 1, sub-s. 1, of the Employers' Liability Act if it is dangerous to the workman using it with ordinary care for the purposes for which he is obliged to use it in the course of his employment, whether the danger arises from the original construction of the machinery or from the mode in which it is used; and an employer is guilty of negligence within the meaning of s. 2, sub-s. 1, of the Act if with ordinary care and examination he ought to have seen that the machinery was so dangerous, notwithstanding that the machinery is in the best form known at the time."

Notes.—The following cases are distinguished on the ground that there was evidence of a defect showing negligence of the employer: *Heske v. Samuelson* [3131]; *Cripp v. Judge* [3138]; *Weblin v. Ballard* [3198]; *Thomas v. Quartermain* [3207]; *Yarmouth v. France* [3141].

3133.—*Greenwood v. Greenwood* (1908), 97 L. T. 771; 24 T. L. R. 24—Div. Ct.

The plaintiff, who was of the age of twenty, and was in the employment of the defendant, a farmer, was engaged in working a straw-pressing machine when he received an injury. In an action to recover damages under s. 1, sub-s. 1, of the Employers' Liability Act, 1880, upon the ground that there was a defect in the condition of the machine, in that it was not properly fenced, the county court judge found that there was a defect in the machine in that, although perfectly made and not requiring a guard, it was a dangerous machine, and that being so, it was the duty of the defendant to instruct those who used it as to its dangers, there being no foreman to do so, and that he had failed in that duty. He accordingly gave judgment for the plaintiff.

HELD—that this did not constitute a defect in the condition of the machine within s. 1, sub-s. 1, of the Employers' Liability Act, 1880, and the defendant was entitled to judgment. The plaintiff having applied to the court to assess compensation under s. 1, sub-s. 4, of the Workmen's Compensation Act, 1897, the court expressed the opinion that the county court judge was the proper tribunal to assess the compensation.

It cannot be said that because an employer provides a dangerous machine and fails to instruct the workman in the use of it that that alone makes the machine defective.

Notes.—If the employer had foremen under him, whose duty it was to instruct the workmen, the employer's duty being to direct

them, and also to see that he had got competent foremen, another point might have arisen. In that case the question which was raised in *Cribb v. Kynoch* (No. 1), [1907] 2 K. B. 548, and in *Young v. Hoffman Manufacturing Co., Ltd.*, [1907] 2 K. B. 646 [3089a], would have arisen; but if the employer had obtained competent foremen and the foremen were negligent and not the employer, still the employer would not have been liable at common law.

It is quite clear that in this case, on the facts as found, that the employer would be liable at common law for neglecting to instruct the plaintiff, since it was personal negligence on the employer's part.

The employer would be liable at common law, not on a measure of damages, calculated as this was, under the Employers' Liability Act, but on a measure of damages to be assessed by a judge and jury.

3134.—*Morgan v. Hutchins* (1890), 59 L. J. Q. B. 197; 38 W. R. 412.

A leather-pressing machine, in every way perfect and in no way defective for the simple purpose of pressing leather, had at its side a wheel and cogs unguarded. The unguarded condition of this wheel and the possible danger likely to arise from it was within the knowledge of the employers. A boy who fed the machine with leather by some means entangled his hand in this wheel and received injuries.

HELD—that, taking sub-s. 1 of s. 1, and sub-s. 1 of s. 2, of the Employers' Liability Act together, the danger caused by this wheel was a defect in the condition of the machine within the first of these sub-sections, since, the danger being within the knowledge of the employers, they were negligent in allowing the wheel to remain unguarded.

Notes.—*Heske v. Samuelson* [3131] referred to; *Walsh v. Whiteley* [3132] distinguished on the ground that there no negligence was traced to the employer.

3135.—*Tate v. Latham*, [1897] 1 Q. B. 502; 66 L. J. Q. B. 349; 76 L. T. 336; 45 W. R. 400—C. A.

The plaintiff was employed by the defendants to assist in the working of a circular saw. The saw bench was provided with a side guard, which was removable for the purpose of taking away the sawdust from under the bench. While the saw was in motion, the plaintiff, in assisting to lift a plank, slipped and, the guard being absent, fell under the bench and was injured by the saw. It was proved that the workman in charge of the saw, whose duty it was to see that the guard was in its place, had on the previous day removed it because it was in his way, and that it had not been replaced.

HELD—that the absence of the side guard constituted a defect in the condition of the machinery within the meaning of s. 1, sub-s. 1, of the Act.

Willets v. Watt [3118] distinguished.

In order to make the defendant liable the defective condition must have arisen from, or must not have been discovered or remedied

owing to, the negligence of the employer, or some person in the service of the employer entrusted by him with the duty of seeing that the machine was in a proper condition.

The workman in charge of the saw was a person entrusted by the employer with the duty of seeing that the machine was in a proper condition, under s. 2, sub-s. 1, of the Act.

Notes.—See also *Robins v. Cubitt* [3158].

3136.—*Stanton v. Scrutton* (1892), 62 L. J. Q. B. 405 ; 5 R. 244.

Defect in the condition of machinery for the purposes of s. 1, sub-s. 1, of the Employers' Liability Act, 1880, includes the absence of proper means to secure safety in the operation for which the machinery is used.

An employer who uses an arrangement of machinery (not in itself defective) the handling of which, as he knows, is entrusted to such men as stevedores' labourers, is not entitled to have excluded from the consideration of its "reasonable fitness" an obvious chance of danger through their want of care.

The absence, in the conditions of the machinery taken as a whole, of any sufficient safeguard against danger arising from an ordinary and probable occurrence as a slip in the management of a winch is a defect.

3137.—*Paley v. Garnett* (1885), 16 Q. B. D. 52 ; 34 W. R. 295 ; 50 J. P. 469.

The plaintiff, a lad of nineteen, was employed in the defendants' paper mill at a machine for cutting jute. The material passed under a roller which conveyed it to the cutter ; but the roller being in several pieces of sections, with interstices between them into which the jute sometimes got, and so impeded the action of the machine, it was necessary (or usual) to remove it by the hand. In doing this the plaintiff lost three fingers. The defect had been pointed out to the defendants, who, to remedy it, procured a roller in one piece ; but the accident happened before the new roller was placed. The maker swore that with care both rollers were equally safe. The jury having found that the injury to the plaintiff was caused by a defect in the machine known to the defendants, and not remedied by them :

HELD—that this finding was warranted by the evidence.

If a machine is unfit for the purposes for which it is applied, it may be said to be "defective" (see *Heske v. Samuelson* [3131]).

(4) "*Plant.*"

3138.—*Cripps v. Judge* (1883), 53 L. J. Q. B. 517 ; 13 Q. B. D. 583 ; 51 L. T. 182 ; 33 W. R. 35 ; 49 J. P. 100—C. A.

Plant is defective within the meaning of the Employers' Liability Act, 1880, if the plant is unfit for the purpose for which it is used, though no part of it is shown to be unsound. Plaintiff, a workman in defendant's employment, was injured by reason of the breaking of a ladder, which was being used to support a scaffold. The ladder

was insufficient for the purpose for which it was being used, and the scaffold and ladder had been placed and were being used under the directions of one of the defendants.

HELD—that, under the above circumstances, there was evidence that the plaintiff had been injured by reason of a defect in the condition of the plant, owing to the negligence of his employer, within the meaning of the Employers' Liability Act, 1880.

Heske v. Samuelson [3131] approved.

The question is not as to the soundness of each individual part of the structure, but the structure as a whole. If the whole arrangement is of an unsound nature the plaintiff is entitled to recover, provided always that the defect can be traced to the negligence of the employer.

3139.—Black v. Fire Coal Co., [1909] S. C. 152—Ct. of Sess

A miner was killed by an escape of carbon monoxide gas in the mine where he was working. The mine owners were not aware of any special danger from carbon monoxide gas in the mine in question, and the managers and firemen appointed by them, while possessed of the qualifications and experience usually possessed by persons holding their office, had no special knowledge of the properties of the gas. For some time prior to the accident there were indications which would have warned persons, having special knowledge of carbon monoxide gas, of its presence, and which would have warned any competent person of danger in the workings. In spite of these indications, no inspection of the mine was made by the manager for the purpose of ascertaining the presence of gas, contrary to the Coal Mines Regulation Act, 1887, s. 49, r. 4 (1), and the miners were not withdrawn from the mine, contrary to r. 7 of the same section, nor was any written record made by the fireman of the presence of noxious gas, contrary to r. 37 of the special rules applicable to the mine.

HELD—first, that the mine owners were not liable to the miners' representatives at common law in respect (a) that they had used reasonable care in appointing competent managers, and (b) that the rules in question prescribed the duties of the manager and fireman, and imposed no duty directly on the mine owners; but, secondly, that the mine owners were liable under the Employers' Liability Act, 1880, in respect of the negligence of their servants and their failure to comply with the rules in question.

3140.—Thompson v. City Glass Bottle Co. (1901), 85 L. T. R. 661.

"Plant" within the meaning of s. 1, sub-s. 1, of the Act includes a machine out of use.

A machine was in a defective state. A foreman ordered that it should not be used again and it was being removed with his sanction by the plaintiff and others when a part fell off injuring the plaintiff.

HELD—that there was evidence that the machine was "plant connected with the business" within the meaning of s. 1, sub-s. 1. Further that the plaintiff had been injured by the negligence of a foreman who was "a person in the service of the defendants to

whose orders the workman was bound to conform" within s. 1, sub-s. 3.

3141.—Yarmouth v. France (1887), 57 L. J. Q. B. 7; 19 Q. B. D. 647; 36 W. R. 281. See S. C. [3096], [3216].

A wharfinger who for the purposes of his business was the owner of carts and horses, owned one horse of a vicious nature, that was unfit to be driven by a careful driver. The plaintiff was in the wharfinger's employ, and had to drive the carts and to load and unload the goods carried in them. In an action for injury by reason of the viciousness of the horse :

HELD—that the horse was "plant" used in the business of the wharfinger, and that the vice in the horse was a "defect" in the condition of such plant within the meaning of s. 1 of the Act.

A "plant" may include whatever apparatus is used by a business man for carrying on his business (see *Blake v. Shaw*, Johns. 732).

Lopes, L.J., dissented from the general opinion of the court on the ground that the plaintiff voluntarily exposed himself to a risk which he well knew (see *Woodley v. The Metropolitan District Railway Co.*, 46 L. J. Ex. 541 [3086]).

See also *Smith v. Baker* [3209], *infra*.

3142.—Haston v. Edinburgh Street Tramway Co., Ltd. (1887), 14 R. 621; 24 S. L. R. 435.

The pursuer, a trace-boy, was injured in consequence of the horse on which he was riding falling. The horse was constantly falling.

HELD—(1) horse "plant" within s. 1 sub-s. 1, and defective.

(2) The boy's superior must be presumed to have known of its unfitness.

3143.—Fraser v. Hood (1887), 15 R. 178; 25 S. L. R. 164.

A horse is "plant" within the meaning of s. 1, sub-s. 1.

3144.—Biddle v. Hart, [1907] 1 K. B. 649; 76 L. J. K. B. 418; 97 L. T. 66; 23 T. L. R. 262; 10 Asp. M. C. 469—C. A.

The defendant, who was a master stevedore, contracted with a shipowner to unload a cargo of sugar from his ship. The sugar, which was in bags, was unloaded by means of a derrick attached at one end to the mast by a shackle and pin. While some of the bags were being hoist out by the derrick the pin came out and the bags fell on the plaintiff, who was employed on the work by the defendant, and injured him. There was evidence that the pin was worn and was not safe for use; and there was evidence that it was usual as between shipowners and stevedores that the former should provide all the appliances, except ropes, slings, and chains, and that the derrick, shackle and pin belonged to the shipowner. In an action to recover damages under s. 1, sub-s. 1, of the Employers' Liability Act, 1880, for negligence in providing defective plant, the county court judge held that the stevedore was not liable for a defect in the ship's

tackle, and he withdrew the case from the jury. The divisional court affirmed this judgment. On appeal:

HELD—that if a stevedore used plant which did not belong to him, he had cast upon him a duty towards his workmen of taking reasonable care to see that the plant was fit for the purposes for which it was required; and that therefore the case ought to have been left to the jury, it being a question of fact for the jury whether the employer has used reasonable care to provide safe and suitable machinery.

3145.—Forsyth v. Ramage and Ferguson (1890), 18 R. 21.

An engineer was injured by falling through a man-hole in a ship in course of construction.

Per Lord Adam (at p. 23): “It appears to me that workmen engaged on a vessel which is in course of construction are bound to exercise caution in making their way about the ship, and in this particular case we know that there were a number of man-holes in the floors of the engine and boiler-rooms—the fault alleged is that there was a failure of duty on the part of the defenders to have the man-hole protected. In the case of a ship under construction, I think this would be out of the question. The man-holes were left open from necessity, and I think there was no failure of duty.”

3146.—Gill v. Thorneycroft (1894), 10 T. L. R. 316.

Barges moored end-on, no rails; workman carrying coal, having to pass others, turned too much to the right, fell into river and was drowned.

HELD—evidence to go to the jury of defect in the plant.

3147.—Henderson v. The Carron Co. (1889), 16 R. 633; 26 S. L. R. 456.

It is negligent to leave “scaffolds” in a blast-furnace for an unusual length of time where the danger could have been removed by blowing out (an expensive operation).

3148.—Perry v. Brass & Son (1889), 5 T. L. R. 253.

Plaintiff was employed by a firm engaged in painting the G. P. O. Over him was one S. The foreman of the works, one J., was in the employment of the Board of Trade. Plaintiff asked S. for a ladder; S. referred him to J. J. authorised him to use one belonging to the Post Office. He did. It broke. He was injured.

HELD—that he had no action under the Employers’ Liability Act, 1880. The ladder not being the “plant” of the defendants, and there being no evidence of negligence on their part.

3149.—Robinson v. J. Watson, Ltd. (1892), 20 R. 144; 30 S. L. R. 144.

Pursuer was the workman of a coalmaster, the pursuer was

injured by a defect in waggons belonging to the railway company, they were merely sent to be loaded.

HELD—(1) that the waggons were not the coalmaster's plant nor used as his plant.

(2) That even if they were he was not negligent in not having them inspected since he was entitled to assume that safe waggons had been supplied. Consequently s. 2, sub-s. 1, was effective as a defence.

3150.—Corcoran v. East Surrey Ironworks Co. (1889), 58 L. J. Q. B. 145. See also *Weblin v. Ballard* [3198].

Where a boy was engaged in moving certain iron stanchions on a trolley, and the stanchions were not packed or protected from falling off, and, by reason of their not being so packed or protected, one of them fell and injured one of the boy's fingers so that it had to be amputated:

HELD—that the neglect to pack or to protect from falling off did not constitute such a defect in plant as would render his employer liable within the meaning of the Employers' Liability Act, s. 1, sub-s. 1.

3151.—Irwin v. Dennystoun Forge Co. (1885), 22 S. L. R. 379.

The workman was injured through a bolt breaking. It looked strong enough, no latent defect was proved. No evidence that it was tested.

HELD—sufficient evidence to support a finding of defective plant.

Notes.—Contrast *Milne v. Townsend* (1892), 19 R. 830, where a crane broke down through a latent defect, and the master was held not liable.

3152.—Johnson v. Mitchell & Co. (1885), 22 S. L. R. 698.

Between the various rooms in a match factory there existed sliding doors to be shut in case of fire. (N.B.—They were emergency doors and consequently ought to have been so made that they could be shut quickly and effectively.) One was so made that it ran on until stopped by the handle. Slight alteration (by fixing a check) would have stopped it at the proper place. The pursuer was told to close this door. He was not used to it. He held the handle; it ran on and hurt his hand.

HELD—a defect in the “plant.”

3153.—Mitchell v. Patullo (1885), 23 S. L. R. 207.

Folding doors banged; they would not have done so had there been stays to fasten the doors. The banging frightened a horse which backed and injured the pursuer.

HELD—no negligence, and therefore no action under the Act of 1880.

Semble, an employer is not guilty of negligence because he fails to adopt the most up-to-date and excellent appliances, he has only to use reasonable precautions.

3154.—Fraser v. Fraser (1882), 9 R. 896 ; 19 S. L. R. 646.

The injury was caused by a rope breaking. The breaking might have been caused by a defect which could have been detected by a skilled person on examination.

HELD—evidence of negligence in not having caused the rope to be examined.

Notes.—If the rope had become defective through the negligence of a fellow-servant, if such servant was a seaman the master would not be liable (*Gordon v. Pyper*, [1892] W. N. 169. Reference may be made to *Macfarlane v. Thompson*, 12 R. 232, where the *onus* of proof was considered.

3155.—Wilson v. Love (1897), 25 R. 280 ; 35 S. L. R. 223 ; 5 S. L. T. 217.

The pursuer was injured by a collapse of scaffolding. There was no evidence of negligence on the part of the defenders or their workmen.

HELD—that although there was a defect in the plant within s. 1, sub-s. 1, s. 2, sub-s. 1, constituted a good defence.

Semble, to prove negligence it is not sufficient to prove an error of judgment merely.

3156.—Macdonald v. Wyllie & Son (1898), 1 F. 339 ; 36 S. L. R. 262 ; 6 S. L. T. 209.

An employer employed an independent contractor to erect a scaffolding. It was defective and the pursuer, a workman, was injured.

HELD—the question of negligence should have been left to the jury.

Notes.—Lord Trayner (at 1 F. p. 346), relied on *Heaven v. Pender*, 11 Q. B. D. 503, and criticised *Kettlewell v. Paterson & Co.* [1819].

3157.—Thomson v. Dick (1892), 19 R. 804 ; 29 S. L. R. 729.

Scaffolding knocked over by a falling stone caused injury. It was possible, but not customary, to guard against such an eventuality.

HELD (Lord Young *dubitante*)—that there was no evidence of negligence and that the defenders were not liable for the defect.

“(b) *By reason of the negligence of any person in the service of the employer who has any superintendence entrusted to him whilst in the exercise of such superintendence*” (s. 1, sub-s. 2).

And note :—

“For the purposes of this Act, unless the context otherwise requires,

"The expression 'person who has superintendence entrusted to him' means a person whose sole or principal duty is that of superintendence, and who is not ordinarily engaged in manual labour" (s. 8 (part)).

3158.—Robins v. Cubitt (1882), 46 L. T. 535.

The defendants, a firm of builders, were erecting a building in Leicester Square, and the plaintiff was a bricklayer's labourer employed on the work in carrying mortar to and fro along the outside of the basement of the building for the use of the bricklayers. A part of the machinery or plant, used in the building work for raising and lowering a pail with materials from the ground to the upper floor where the bricklayers were at work, was what is called a "gin wheel and fall," consisting of a pulley, over or through which ran a rope to the end of which were attached two short pieces of rope of equal length, with an open hook at the end of each, which hook clipped the handle of the pail, "one in and one out," on opposite sides. Two men were employed to work this machinery, one at the top of the building and the other at the bottom, it being the duty of the man at the bottom to hold the rope so as to steady the pail. On the occasion in question the bottom man was temporarily absent, without leave and unknown to the foreman of the works; and, in consequence of his absence, a pail of cement, which was being lowered, swayed from side to side in its descent, and, striking against a cross timber, became unhooked and fell, knocking down and injuring the plaintiff, who, in the ordinary course of his employment, was passing with mortar underneath it.

HELD—that the jury having found that there was no defect in the defendants' machinery, and that the accident was caused by the negligence or default of the men employed in lowering the pail, who were not persons "entrusted with any superintendence," but ordinary workmen, like the plaintiff himself, the case did not fall within either of the two sub-ss. 1 and 2 of s. 1 of the Act, which were the only ones applicable to it, and that, consequently, the defendants were not liable to the plaintiff for the consequences of the accident.

3159.—Shaffers v. General Steam Navigation Co. (1883), 52 L. J. Q. B. 260; 10 Q. B. D. 356; 48 L. T. 228; 31 W. R. 656; 47 J. P. 327.

The plaintiff and one J. were employed with others by the defendants in loading sacks of corn into the hold of a ship. J.'s duty was to guide the beam of the crane by means of a guy-rope, and to give directions when to lower and hoist the chain. He neglected to use the guy-rope, and the sacks in consequence fell down the hatchway, and hurt the plaintiff, who was working in the hold.

HELD—that J. was "engaged in manual labour," and was not "a person having superintendence entrusted to him," within the meaning of the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), s. 1, sub-s. 2, as defined by s. 8.

3160.—Farnham v. New Bank Coal Co. (1896), 23 R. 722 ; 33 S. L. R. 555 ; 4 S. L. T. 2.

An engineman (winder) at a pithead is not a person having superintendence entrusted to him within the meaning of s. 1, sub-s. 2, in relation to a miner in a mid-working who was about to go up in the cage.

3161.—Kellard v. Rooke (1888), 57 L. J. Q. B. 599 ; 21 Q. B. D. 367 ; 36 W. R. 875 ; 52 J. P. 820—C. A.

The plaintiff, with other workmen, was employed by the defendant to stow bales of wool in the hold of a ship. The workmen were divided into gangs, the foreman of the plaintiff's gang being B. B. was himself a labourer, working on deck, and he gave the signal to the men below when the bales were being dropped down the hatchway into the hold. The plaintiff, who was below, was injured by a bale which, according to his statement, was dropped down without sufficient warning being given by B. to enable him to get out of the way.

HELD—that the plaintiff was not entitled to recover, as B. was not a person who had superintendence entrusted to him within s. 1, sub-s. 2, as defined by s. 8 of the Employers' Liability Act, 1880, nor was there any evidence that the injury resulted from the plaintiff having conformed to any order of B. within s. 1, sub-s. 3, assuming that B. was a person to whose orders the plaintiff was bound to conform.

3162.—Osborne v. Jackson (1883), 11 Q. B. D. 619 ; 48 L. T. 642.

An employer may be liable under the Employers' Liability Act, 1880, s. 1, sub-s. 2, where personal injury is caused to a workman, "by reason of the negligence of any person in the service of the employer who has any superintendence entrusted to him whilst in the exercise of such superintendence," although the superintendent, when negligent, is voluntarily assisting in manual labour.

If a foreman thrusts upon the plaintiff a duty which he could not safely perform, this is negligence.

If the foreman had directed another to do what he himself did, he would be guilty of negligence in the exercise of superintendence. Therefore, it makes no difference whether the foreman himself does the negligent act, or tells someone else to do it.

3163.—Ray v. Wallis (1887), 51 J. P. 519.

An employer may be liable under s. 1, sub-s. 2, of the Employers' Liability Act, 1880, although the superintendent, when negligent, is voluntarily assisting in manual labour ; the superintendent need not of necessity have actual superintendence over the workman injured.

3164.—Donnelly v. Spencer & Co. (1899), 1 F. 1107 ; 36 S. L. R. 876.

The pursuer was injured whilst loading cases. The operations were under the charge of a foreman. While the case was balanced

on an insecure base the foreman, without warning, canted it. It fell and caused the injury.

HELD—the foreman had not ceased to superintend and that the case fell within s. 1, sub-s. 2, of the Act.

3165.—Bowie v. Rankin & Co. (1886), 13 R. 981 ; 23 S. L. R. 706.

A heavy weight was being moved along a floor on a bogie truck. The pursuer was told to push. The foreman had tackle attached to it and to the roof to hold it if it fell. There was a depression in the floor over which the truck passed, the truck ran down this depression and the tackle being too short to follow the truck, lifted the weight which swung to the vertical and passed it, pinning the pursuer against a machine.

HELD—negligence on the part of the superintendent (*i.e.*, employer liable under s. 1, sub-s. 2 (see Lord Justice-Clerk, at 13 R. p. 984)).

Seemle, an error of judgment may amount to negligence.

3166.—Gilligan v. Milne & Co. (1887), 24 S. L. R. 279.

The pursuer was injured by lifting a heavy weight. He told the foreman superintending that he could not lift it and asked for the use of a crane. Refused.

HELD—no negligence on the part of the person in superintendence and that no action lay under the Act of 1880.

Notes.—N.B.—Special facts were present here (see Lord Moncrieff's judgment, at p. 287).

3167.—Harris v. Tinn (1889), 5 T. L. R. 221.

Workman was injured while engaged with others under a foreman in prising up a heavy roll of iron. There was no scotch to prevent it rolling one way or another. One side prised harder than the other, and it rolled over to the weaker side injuring the man there.

HELD—an accident for which the employer was not liable.

Notes.—Reference may also be made to *Kay v. Briggs* (1889), 5 T. L. R. 233, and *Pack v. Hayward* (1889), 5 T. L. R. 233, for cases where on the evidence the court held that the injury was caused by an accident and not by negligence. See also *Gray v. Douglas* (1890), 17 R. 858.

3168.—Milligan v. Muir & Co. (1891), 19 R. 18 ; 29 S. L. R. 36.

Per Lord Justice-Clerk Macdonald: "The mere fact that a foreman sees a workman doing a piece of work in an unusual way, and does not interfere, is scarcely a ground for holding the foreman's master liable for the consequences of what the workman does, if it results in injury to him."

3169.—Seeley v. Jackson & Sons (1882), 20 S. L. R. 11; S. P., **M'Quade v. Dixon** (1887), 14 R. 1039.

Where an accident is a pure misadventure without fault on the part of the employer or anyone, no action lies under the Employers' Liability Act, 1880.

3170.—Gray v. Thomson (1889), 17 R. 200; 27 S. L. R. 113.

The bye-laws of a harbour provided that "every vessel in the harbour having any large opening in the deck . . . shall, after dark, have such opening either securely covered or properly lighted, and under the charge of a special watchman." To facilitate and render possible night work, a large opening in the deck was uncovered and a watchman was provided with instructions *inter alia* to have the opening properly lighted. All necessary materials were provided. At the time of the accident (which was caused by the workman falling through the opening) there was a light near the opening but the watchman was absent from duty.

HELD (Lord Lee *diss.*)—(1) that the watchman was a fellow-servant and not a person having superintendence.

(2) That there was no negligence on the part of the employer, who was not liable under the Act of 1880.

3171.—Falconer v. M'Cabe (1900), 3 F. 210; 38 S. L. R. 112.

A foreman whose duties are partly those of a labourer and partly those of an oversman is not a "person who has superintendence" within the meaning of s. 8.

3172.—Moore v. Ross (1890), 17 R. 796; 27 S. L. R. 626.

In averring fault of a "superintendent" his duties should be detailed, and the fact that he is not usually employed in manual labour alleged.

Notes.—This case was distinguished in *M'Leod v. Pirie* [3173] on the ground that where the averment shows facts from which it is obvious that the person was a superintendent, *e.g.*, an estate agent, it is not necessary to aver that he is not engaged in manual labour; but where (as here) it is not obvious what the person's rank was, *e.g.*, a laundry forewoman, it is necessary.

3173.—M'Leod v. Pirie (1893), 20 R. 381; 30 S. L. R. 425.

Pursuer alleged that he was engaged under the direction of G., the estate manager of the defender, who owned a property in Ross-shire, and that when the defender was resident in London, the entire control and management of his estates were left in the hands of G.

HELD—a sufficient averment to bring G. within the definition of "person who has superintendence" within the meaning of s. 8.

Question of sufficiency of notice reserved for trial judge.

3174.—Race v. Harrison (1893), 10 T. L. R. 92.

S., superintendent of employer's yard, failed to supply sufficient scrapers for scraping the clay off machines. In the absence of scrapers boys did it with their hands. The plaintiff was one of these boys. He was young and inexperienced. He was given no instruction as to how to work.

HELD—evidence of negligence on the part of S. so as to bring the case within s. 1, sub-s. 2, of the Act of 1880.

3175.—M'Dadi or M'Coll and Others v. Black and Eadie (1891), 18 R. 507.

Deceased was killed by the sides of a drain in which he was working falling in. The work was being done under the superintendence of a foreman. The sides were not propped with wood. The defendants, the pursuers, pleaded the common law and s. 1, sub-ss. 1, 2, 3 of the Employers' Liability Act, 1880.

HELD (Lord Young *diss.*)—that the pursuers were entitled to an issue on the averments as pleaded.

(c) “*By reason of the negligence of any person in the service of the employer to whose orders or directions the workman at the time of the injury was bound to conform and did conform, where such injury resulted from his having so conformed*” (s. 1, sub-s. 3).

3176.—Reynolds v. Holloway (1898), 14 T. L. R. 551.

In an action under the Employers' Liability Act, 1880, s. 1, sub-s. 3, it is necessary to prove (1) that the person who gave the order was one to whose orders or directions the deceased was bound to conform; (2) that the deceased did conform; (3) that the injury was caused by his having so conformed.

Circumstances in which these facts were held proved.

Hooper v. Holme and King [3184] distinguished.

3177.—Wild v. Waygood, [1892] 1 Q. B. 783; 61 L. J. Q. B. 391; 66 L. T. 309; 40 W. R. 501; 56 J. P. 389—C. A. See S. C. [3107].

The negligence referred to in s. 1, sub-s. 3, of the Employers' Liability Act is not confined to negligence in the order itself; and in order to establish liability under that sub-section it is not necessary that conformity to the order should be the *causa causans* of the injury, though, *semble*, there must be an intimate connection between the negligence, the injury, and the conformity to the order.

A joiner, employed by a firm of lift contractors in the construction of a lift in a house in the course of erection, having with the sanction of his employers borrowed a workman from a firm of builders engaged on the premises, ordered him to put a plank across the well of the lift and stand upon it, and then started the lift, whereby the plank was upset and the workman was injured. The workman sued the

lift contractors under the Employers' Liability Act, and obtained a verdict.

HELD—that there was evidence to go to the jury, first, that the plaintiff was, at the time of the injury, a workman in the service of the defendants; secondly, that the order to stand upon the plank was given by a person to whose orders the plaintiff was bound to conform.

HELD FURTHER—that the injury resulted from the plaintiff having so conformed.

3178.—*Millward v. Midland Railway* (1885), 54 L. J. Q. B. 202; 14 Q. B. D. 68; 52 L. T. 255; 33 W. R. 366; 49 J. P. 453.

The plaintiff, a boy employed by the defendants, a railway company, was assisting a carman of the defendants, under whose directions he was, in unloading from a van three large iron window frames. The frames were standing upright in the van, secured at each end to the hoops of the van by a string. The carman untied the string at one end of the frames, and the plaintiff untied the string at the other end. The carman did not expressly order the plaintiff to untie the string, but the plaintiff stated that he did so without orders because he had done so on previous occasions, and that the carman saw him untie the string and made no objection. The carman then removed one of the frames without re-tying the two remaining frames, leaving them standing unsecured. They directly afterwards fell on the plaintiff, causing him injuries in respect of which he sued the defendants for compensation under the Employers' Liability Act, 1880.

HELD—that there was on the above facts evidence of an injury to the plaintiff by reason of the negligence of a fellow-workman to whose orders he was bound to conform, and did conform, and which resulted from his having so conformed.

The "order" need not be specific, it may be implied.

Notes.—See also *Kellard v. Rooke* [3161].

3179.—*Dolan v. Anderson and Lyell* (1885), 12 R. 804; 22 S. L. R. 529.

A riveting machineman in the employer's works was engaged at a riveting job on a pinnace along with three other workmen (including the pursuer) who had about one-third less wages than the machineman; the machineman gave directions but he could only enforce these directions by appeal to the foreman of the works. He gave orders which resulted in the injury.

HELD—that the machineman was a person to whose orders the pursuer was bound to conform within the meaning of s. 1, sub-s. 3.

Notes.—*Millward v. Midland Railway* [3178] relied upon.

3180.—*Medway v. Greenwich Inlaid Linoleum Co., Ltd.* (1898), 14 T. L. R. 291.

Plaintiff had worked a machine for years in a dangerous manner. He had been taught to work it in this way by a person to whose

orders he was bound to conform. On the day the accident happened this person told him to work the machine. He did so in his usual dangerous way and was injured.

HELD—the order to work the machine meant to work the machine in the way plaintiff had been taught, *i.e.*, in a dangerous way, and that the employer was liable.

Whether the workman has or has not agreed to undertake the risk is a jury question.

3181.—**Howard v. Bennett** (1888), 58 L. J. Q. B. 129 ; 60 L. T. 152 ; 53 J. P. 359.

In an action to recover compensation under the Employers' Liability Act, 1880, it appeared that the plaintiff with another workman was employed by the defendants to work a calico-printing machine. Each machine required two men—the back-tenter, who kept the calico straight as it passed through, and the printer who, amongst other things, started it and regulated the speed. The plaintiff was a back-tenter. The printer having told the plaintiff to do something which necessitated his placing his hands between the rollers and the cylinder, before he had time to withdraw them started the machine without warning, and the plaintiff's fingers were cut off.

HELD—that the plaintiff was not entitled to recover, the direction by the printer not being an order or direction within sub-s. 3 of s. 1 of the Act, and the injury having been caused by the printer starting the machine too soon, that is to say, the injury was caused by the negligence of a fellow servant and not in consequence of obeying the orders of a person to whose orders he was bound to conform.

Notes.—See *Wild v. Waygood* [3107].

3182.—**Snowden v. Baynes** (1890), 59 L. J. Q. B. 325 ; 25 Q. B. D. 193 ; 38 W. R. 744 ; 55 J. P. 133—C. A.

The plaintiff, in an action under the Employers' Liability Act, 1880, to recover compensation for personal injury, was employed by the defendant as a machinist, and was accustomed to work at a particular machine in a particular shed. A carpenter, also in the employ of the defendant, used to receive directions from the defendant as to the work to be done, and give orders to the plaintiff as to what work he should do. The plaintiff was bound to conform to these orders, but the authority of the carpenter went no further, and in the performance of the work the plaintiff received no directions from him, and was in no way under his control. On one day, when work was proceeding in this way, the plaintiff, whose regular time was up at half-past five, by his own doing elected to work overtime. While he was so doing the carpenter came into the shed in which he was working, and which was not a safe place for two people to work in at once, and began to work, and by admitted negligence caused injury to the plaintiff.

HELD—that the plaintiff was not entitled to recover, as the injury did not result from his having conformed to the orders of a

person in the service of the employer, to whose orders at the time of the injury he was bound to conform, and did conform, and therefore s. 1, sub-s. 3, of the Act did not apply, since it appeared that the carpenter had no general power to give orders, or to control the plaintiff in his work, and also that there was no evidence to show that the accident resulted from the plaintiff conforming to any order given by the carpenter.

3183.—Bunker v. Midland Railway (1882), 47 L. T. 476 ; 31 W. R. 231.

The plaintiff (by next friend) sued the defendants under the Employers' Liability Act, 1880, for damages sustained through the negligence of their foreman. The plaintiff, a van guard in the service of the defendants, was at the time of the accident under the age of fifteen. There was a rule of the company, known to the plaintiff, that no van guard under the age of fifteen was ever to drive a van. The defendant's foreman on the occasion in question ordered the plaintiff to drive a van load of fish to B. market, and he would be paid extra money for so doing. The boy did drive the van, and in consequence was thrown down from his seat and seriously injured. The plaintiff at the trial was nonsuited on the ground that he was offered and accepted extra money to drive, and was not obliged to obey in that respect the foreman who offered the money. The plaintiff obtained a rule *nisi* for a new trial.

HELD (on cause shown)—that the plaintiff had been rightly nonsuited, for the foreman was not a person to whose orders he was *bound* to conform (so as to come within s. 1, sub-s. 3, of the Act), and that he had been guilty of contributory negligence disentitling him to recover.

3184.—Hooper v. Holme and King (1896), 13 T. L. R. 6.

Defendants were railway contractors. Plaintiff was employed by defendants. He worked with a gang. C. was foreman of the gang. D., defendant's engineer, gave instructions that men were not to work without a look-out. Whilst deceased was working C. sent the only man available as a look-out man to fetch tools. Deceased went to mix cement in a dangerous place similar to that in which C. was working, was struck by a train and killed.

HELD—no evidence that C. had authority to give orders or that deceased was bound to conform to such orders if given. The mere fact that C. was working in a dangerous place raised no inference of an implied order to the deceased to work in a similarly dangerous place. Judgment for defendants.

3185.—Brown v. Furnival (1896), 23 R. 492 ; 33 S. L. R. 345 ; 3 S. L. T. 258.

In order to render an employer liable under s. 1, sub-s. 3, of the Act, it is not enough to show that an order was given which resulted in the injury ; it must be shown that it was an improper order, that is to say negligence must be shown.

Quære (per Lord Young), whether a fitter who, during the unloading of a machine from a lorry, orders the labourers engaged to tilt it up is a person to whose orders they were bound to obey within the meaning of s. 1, sub-s. 3.

M'Manus v. Hay [3187] followed.

3186.—*Hamilton v. The Hyde Park Foundry Co.* (1885), 22 S. L. R. 709.

C. was head foreman; H. was foreman of a squad. The squad were sent to dig sand; they dug the sand (unnecessarily) near a column placed there twelve days before. In consequence of the excavation the column fell and killed H.

HELD—the accident was one which a reasonable man could not have foreseen when the order was given, and therefore C. was not negligent (nor H.). That consequently no action lay under the Act of 1880.

3187.—*M'Manus v. Hay* (1882), 9 R. 425; 19 S. L. R. 345.

Although a person is injured in consequence of obeying orders within s. 1, sub-s. 3, he cannot recover unless he shows negligence.

3188.—*Sweeney v. M'Gilvray* (1886), 14 R. 105; 24 S. L. R. 91.

Where a person to whose orders the workman is bound to conform gives an order and fails to take reasonable precautions to have it safely executed the employer is responsible under s. 1, sub-s. 3.

3189.—*Kettlewell v. Paterson & Co.* (1886), 24 S. L. R. 95.

A working glazier having been supplied by his employer, who had a contract to do glazing work, with suitable scaffolding, was directed by his foreman to use another scaffolding which had been erected by the employee of a person who had the contract to do the joinery work on the same job. It was made of defective material and gave way.

HELD—no negligence in the order given and the employer was not liable under s. 1, sub-s. 3.

3190.—*Flynn v. M'Gaw* (1891), 18 R. 554; 28 S. L. R. 392.

The foreman of a firm of housebreakers ordered a labourer (who was bound to conform) to go upon a certain floor. The foreman should have foreseen danger as the floor was decayed. It gave way.

The court allowed an issue (*Lord Young diss.*).

3191.—*Kiddle & Son v. Lovett* (1885), 16 Q. B. D. 605.

Where A. employs an independent contractor B. to put up boat-staging, and B. puts it up, in breach of contract, so that it is insecurely fastened, whereby A.'s servant is injured, A., in the absence of negligence on his part, is not liable under the Employers' Liability Act, 1880. And so, if he settles with the workman for £125, that

does not express the true measure of damages recoverable from B. for B.'s breach of contract.

Notes.—See also *Campbell v. Morrison* (1891), 19 R. 282.

- (d) “ *By reason of the act or omission of any person in the service of the employer done or made in obedience to the rules or bye-laws of the employer, or in obedience to particular instructions given by any person delegated with the authority of the employer in that behalf* ” (s. 1, sub-s. 4).

And note :—

“ A workman shall not be entitled under this Act to any right of compensation or remedy against the employer in any of the following cases ; that is to say :

- “(2) Under sub-section four of section one, unless the injury resulted from some impropriety or defect in the rules, byelaws, or instructions therein mentioned ; provided that where a rule or byelaw has been approved or has been accepted as a proper rule or byelaw by one of Her Majesty's Principal Secretaries of State, or by the Board of Trade or any other department of the Government, under or by virtue of any Act of Parliament, it shall not be deemed for the purposes of this Act to be an improper or defective rule or byelaw ” (s. 2, sub-s. 2).

3192.—*Whatley v. Holloway* (1890), 62 L. T. 639 ; 54 J. P. 645.

The plaintiff was employed by the defendant, the owner of a saw-mill, containing saws driven by steam power, and on a certain day he was told by the defendant's foreman to cut some wood in specified lengths with the circular saw. This work was generally performed by two men, one “ feeding ” the saw and the other taking the wood out from it. A. was engaged by the defendant to attend to the engine and boiler and to assist generally in the saw-mill, and was also told “ not to neglect the engine.” At the time in question the plaintiff was at one end of the saw-frame pushing the wood through it and A. was at the other end receiving the wood coming out from the saw. Hearing steam blowing off A. suddenly, and without notice to the plaintiff, let go the wood and ran to the engine-room, whereupon the wood, becoming unsteady, shook the plaintiff's hand against the saw, which cut and injured his fingers. In an action in the county court, under sub-s. 4 of s. 1 of the Employers' Liability Act, 1880, the plaintiff recovered damages.

HELD—that the plaintiff was not entitled to recover, on the ground that, although the injury was caused by “ the act or omission ” of A. in leaving the saw without notice to the plaintiff, there was no evidence that such act or omission was “ done or made in obedience to any rule or bye-law of the employer, or to instructions by any delegate of his.”

- (e) "*By reason of the negligence of any person in the service of the employer who has the charge or control of any signal, points, locomotive engine, or train upon a railway*" (s. 1, sub-s. 5).

3193.—Gibbs v. Great Western Railway (1884), 53 L. J. Q. B. 543
12 Q. B. D. 208 ; 50 L. T. 7 ; 32 W. R. 329 ; 48 J. P. 230—C. A.

In an action for compensation under the Employers' Liability Act, 1880, the evidence showed that it was the duty of F., a workman employed in the signal department of the defendant's railway, to clean oil and adjust the points and wires of the locking apparatus at various places along a portion of the line, and to do slight repairs ; that for these purposes he was, with several other men, subject to the orders of an inspector in the same department, who was responsible for the points and locking gear, which were moved and worked by men in the signal boxes, being kept in proper condition ; and that F. having taken the cover off some points and locking gear, in order to oil them, negligently left it projecting over the metals of the line, whereby injury was caused to a fellow-workman.

HELD—that there was no evidence for the jury that F. had "charge or control" of the points within the meaning of s. 1, sub-s. 5, of the Employers' Liability Act, 1880, so as to make the defendants liable for his negligence.

3194.—McCord v. Cammell & Co., [1896] A. C. 57 ; 65 L. J. Q. B. 202 ; 73 L. T. 634 ; 60 J. P. 180—H. L. (E.)

For the purpose of the Employers' Liability Act, 1880, s. 1, sub-s. 5, the word "train" includes either a locomotive engine by itself or anything drawn along the railway, and does not necessarily import a plurality of vehicles ; and the words "the person having charge or control" do not of necessity point to a person in charge of the whole train. Different duties and different parts of the train may be assigned to different persons, each of whom is charged with the conduct of the train, and by his negligence may make the employer liable.

3195.—Cox v. Great Western Railway (1882), 9 Q. B. D. 106 ; 30 W. R. 816 ; 47 J. P. 116.

H., who was in the employ of a railway company as a "capstan-man," without giving the usual warning, propelled a series of trucks along a line of rails in a goods station, and injured the plaintiff, who was engaged in similar work at the other end of the line about 100 yards off. The capstan was set in motion by hydraulic power communicated to it by H. from a stationary engine at a distance.

HELD—that there was evidence to warrant the jury in finding that H. was a person who had the charge or control of "a train upon a railway" under s. 1, sub-s. 5 of the Employers' Liability Act, 1880.

3196.—Doughty v. Firbank (1883), 52 L. J. Q. B. 480 ; 10 Q. B. D. 358 ; 48 L. T. 530 ; 48 J. P. 55.

The meaning of the term "railway" as used in sub-s. 5 of s. 1, of the Employers' Liability Act, 1880, is not confined to railways

belonging to railway companies such as are subject to the provisions of the Railway Regulation Acts; but the sub-section applies to a temporary railway laid down by a contractor for the purposes of the construction of works.

3197.—Murphy v. Wilson (1883), 52 L. J. Q. B. 524; 48 L. T. 788; 47 J. P. 565; 48 J. P. 24.

A steam crane fixed on a trolley, and propelled by steam along a set of rails when it is desired to move it, is not a “locomotive engine,” within the Employers’ Liability Act, 1880, s. 1, sub-s. 5.

The word “locomotive engine” must be used in the ordinary and well-known meaning and can refer only to an engine used for traction.

IV. *The Defence of Contributory Negligence.*

3198.—Weblin v. Ballard (1886), 55 L. J. Q. B. 395; 17 Q. B. D. 122; 54 L. T. 532; 34 W. R. 455; 50 J. P. 597.

An employer, when sued under the Employers’ Liability Act, 1880, for personal injury to a workman caused by any of the matters mentioned in s. 1 of the Act, cannot avail himself of the defence that the injury was caused by the negligence of a fellow servant, or that the workman had contracted to take upon himself the risks incident to the employment; but he may avail himself of the defence of contributory negligence on the part of the workman, and also, under s. 2, sub-s. 3, of his failure to give notice of the defect or negligence which caused the injury. The deceased was employed as fireman at the defendant’s brewery. In the engine-room, at some distance from the floor, was a valve to turn on steam to a donkey-engine. This valve was only reached by means of a ladder placed against a lower pipe, but, by reason of a bend in the last-mentioned pipe, the ladder (though in itself perfect), being without hooks or stays, was unsafe for the purpose for which it was used. The defendant had himself seen the ladder so used. The deceased was found dead in the engine-room, having been apparently killed by the ladder slipping while he was upon it. In an action by his personal representative under the Employers’ Liability Act, the county court judge found that there was a defect in the condition of the plant within the meaning of s. 1, sub-s. 1, of the Act, and that, although the deceased knew of the defect, he was excused from informing the defendant of it, because he was aware that the latter knew of it.

HELD—that this finding was warranted by the evidence, and that contributory negligence on the part of the deceased was not necessarily proved by the mere fact that he knew that the work was of itself dangerous.

Notes.—On the question of what constitutes “defects” *Heske v. Samuelson* [3131] is relied upon. As to whether mere knowledge of the danger on the part of the workman constitutes a defence, *i.e.*, as to whether the defence *Volenti non fit injuria* applies to cases under the Employers’ Liability Act, 1880, see *Thomas v. Quartermaine* [3208].

3199.—McEvoy v. Waterford Steamship Co. (1886), 18 L. R. Ir. 159.

A defence of contributory negligence may be relied on in an action under the Employers' Liability Act.

Notes.—See also *M'Carthy v. British Shipowners' Co.*, 10 L. R. Ir. 384 [2999], in which it was decided that the proper issues to be submitted to the jury are, first, whether the defendants were guilty of any negligence in causing the accident. If so, secondly, did the plaintiff himself, by his own negligence, so directly contribute to the happening of the accident that but for the plaintiff's own negligence the accident would not have happened?

3200.—Grant v. Drysdale (1883), 10 R. 1159 ; 20 S. L. R. 774.

The pursuer was working in a quarry, overhead was a donkey-engine. From the engine a cinder fell on to some gunpowder, igniting it and injuring the pursuer. Cinders frequently fell to the pursuer's knowledge. The defenders pleaded contributory negligence.

HELD—no contributory negligence, for though a man who voluntarily, *i.e.*, unnecessarily, encounters a seen danger, which with ordinary care and attention to his own safety he might have avoided, cannot recover, yet this rule is only applicable when the danger is visible and avoidable, so that a man with ordinary care for his own safety could avoid it and be chargeable with want of ordinary care if he did not.

Per Lord Young (10 R., pp. 1161, 1162): Under the Act "where there is no fault there is no action . . . a workman shall not, any more than any other, receive compensation for injuries for which no one is to blame."

3201.—Moore v. Ross (1890), 17 R. 796 ; 27 S. L. R. 626.

The existence of a trap-door of which the pursuer knew and through which she fell, amounts neither to a "defect" within s. 1, sub-s. 1, nor to negligence.

Per Lord M'Laren (17 R., p. 729): "Then the question as to 'known danger' is raised. One class of cases of this sort is where the master by the adoption of some known and suitable appliance may diminish the danger to his servants, and does not adopt it; in such cases the rule of the statute as to injuries resulting from defects in the way, works, or plant will probably apply. But the other class of cases is where the danger is one against which it is perfectly in the power of the servant to guard himself simply by keeping his eyes open. That is the typical case in which the law says that the servant must take the consequences of his own neglect."

3202.—Cook v. Stark (1886), 14 R. 1 ; 24 S. L. R. 5.

A manager of a quarry may in ordinary circumstances delegate his duty of personally superintending; but if the work to be done be of peculiar difficulty, danger and rarity, it is his duty to personally superintend, and failure to do so is negligence.

Seemle, it does not amount to contributory negligence to use a steel jumper instead of a copper needle to extract an unexploded charge unless it be shown that the workman appreciated the risk he was running, that is to say, where the risk was not so obvious that no reasonable man could be blind to it.

3203.—Adams v. Glasgow and South Western Railway Co. (1894), 32 S. L. R. 40 ; 1 S. L. T. 277.

Where a shunter was injured and it appeared that the railway company had taken all the usual precautions and that the injury would have been averted had the pursuer not stepped back or had he looked up the line when he did not step back :

HELD—(1) no negligence in the employer ; (2) if negligence contributory negligence on the part of the pursuer.

Seemle, a shunting porter is not a “ person in superintendence.”

3204.—Noonan v. Dublin Distillery Co. (1893), 32 L. R. Ir. 399.

If machinery can be worked by a servant in a reasonable manner without danger to himself, no instruction being given to him to work it in a mode which would endanger his safety, where the safe mode, as well as the dangerous mode, of working are known to him, the danger of the latter mode being apparent, the employers are not liable under the Employers’ Liability Act, 1880, for damages for the death of the servant, caused by working the machine in a dangerous way.

The standard of the fitness of the machinery and of the reasonableness of the precautions must depend upon the degree of care which the master is entitled to expect on the part of the workman.

Thus an ordinary workman might be injured by tools which were innocuous in the hands of a skilled workman.

3205.—Ayres v. Bull (1889), 5 T. L. R. 202.

Plaintiff was injured in consequence of going down a defective ladder in high-heeled shoes.

HELD—a clear case of contributory negligence.

V. *The Defence of Knowledge of “ Defect or Negligence.”*

“ A workman shall not be entitled under this Act to any right of compensation or remedy against the employer in any of the following cases ; that is to say,

“(3) In any case where the workman knew of the defect or negligence which caused his injury, and failed within a reasonable time to give, or cause to be given, information thereof to the employer or some person superior to himself in the service of the employer, unless he was aware that the employer or such superior already knew of the said defect or negligence ” (s. 2, sub-s. 3).

3206.—Martin v. Connah's Quay Alkali Co. (1885), 33 W. R. 216.

Where a waggon was in a defective state, of which a workman was aware, and he used it in such a way as to cause injury to himself, when he knew how to use and might have used it so as not to cause injury to himself, he cannot recover under the Employers' Liability Act, 1880, s. 1.

3207.—Stuart v. Evans (1883), 49 L. T. 138 ; 31 W. R. 706.

The plaintiff's husband S. was a slater ; the defendant was a builder and had on several occasions employed S. to slate houses for him. The defendant provided the slates, poles and scaffolding, but S. had his own tools, and was paid by the piece. On the occasion of the accident the scaffolding erected by the defendant was in a manifestly unsafe state, and the defect in it was known to the defendant or his superintendent, and S. knew that it was so known to them. S., notwithstanding the defect, ascended a ladder to finish the slating, but the scaffolding gave way, and S., who was on the ladder at the time, fell to the ground, sustaining injuries from which he died.

HELD—that the deceased was a workman within the meaning of s. 8 of the Employers' Liability Act, and that, although the deceased was aware of the defect in the scaffolding, yet, as he knew that the defendant or his superintendent was aware of it also, sub-s. 3 of s. 2 of the Act would enable the plaintiff to recover compensation for his death.

Seemle, contributory negligence is a defence under the Act as at common law, but knowledge of a defect in machinery, etc., does not necessarily, in itself, amount to contributory negligence.

VI. *The Defence of Consent.*

3208.—Thomas v. Quartermaine (1887), 56 L. J. Q. B. 340 ; 18 Q. B. D. 685 ; 57 L. T. 537 ; 35 W. R. 555 ; 51 J. P. 516—C. A.

The plaintiff was employed in a cooling room in the defendants' brewery. In the room were a boiling vat and a cooling vat, and between them ran a passage which was in part only 3 feet wide. The cooling vat had a rim raised 16 inches above the level of the passage, but it was not fenced or railed in. The plaintiff went along this passage to pull a board from under the boiling vat. This board stuck fast and then came away suddenly, so that he fell back into the cooling vat and was scalded. In an action under the Employers' Liability Act, 1880.

HELD (Lord Esher, M.R., *diss.*)—that the defence arising from the maxim *Volenti non fit injuria* had not been affected by the Employers' Liability Act, 1880, and applied to the present case, and that there was therefore no evidence of negligence arising from a breach of duty on the part of the defendant towards the plaintiff, and that the plaintiff was not entitled to recover.

3209.—Smith v. Baker, [1891] A. C. 325; 60 L. J. Q. B. 683; 65 L. T. 467; 40 W. R. 392; 55 J. P. 660—H. L. (E.).

The appellant, a workman in the employment of the respondents, was working in a railway cutting with hammer and drills, when a stone, fastened by a chain to another chain hanging from a crane which was being “jibbed” over his head, slipped from its fastenings, struck and seriously injured him. In the county court the jury found that the machinery used for lifting the stone was not reasonably fit for its purpose; that the omission to supply special means of warning when the stones were being “jibbed” was a defect in the “ways, works, machinery, and plant” within the Employers’ Liability Act; that the employers were guilty of negligence, and that the appellant was not guilty of contributory negligence; and they awarded £100 damages, for which the judge entered judgment for the plaintiff. The notice of appeal to the divisional court, and subsequently to the court of appeal, was based solely on the ground that the plaintiff had voluntarily undertaken the risk. The Court of Appeal decided in favour of the defendants both on this ground and also on the ground that there was no evidence of negligence.

HELD—that the appeal must be allowed on the ground that the appellant had not voluntarily undertaken the risk, and that it was not competent to the house to enter into the question of negligence, as the point was not taken in the county court.

HELD ALSO—that there was negligence in that the machinery was not reasonably fit for its purpose, and no special warning was supplied to the men imperilled by the operation.

A person who relies on the maxim *Volenti non fit injuria* must show a consent to the particular thing done, though such consent may be inferred from the course of conduct as well as expressed in terms; but mere knowledge of a risk does not necessarily involve consent. A negligent system or a negligent mode of using perfectly sound machinery may make the employer liable, quite apart from the Employers’ Liability Act.

The maxim *Volenti non fit injuria* explained and illustrated.

The contract between employer and employed involves on the part of the former the duty of taking reasonable care to provide proper appliances and to maintain them in a proper condition, and so to carry on his operations as not to subject those employed by him to unnecessary risk.

3210.—Wallace v. Culter Paper Mills Co. (1892), 19 R. 915; 29 S. L. R. 784.

Follows *Smith v. Baker* [3209].

3211.—Smith v. Forbes & Co. (1897), 24 R. 699; 34 S. L. R. 513; 4 S. L. T. 341.

Follows *Smith v. Baker* [3209] and *Wallace v. Culter Paper Mills Co.* [3210].

3212.—Wilkinson v. Kinneil Cannel and Coking Coal Co. (1897), 24 R. 1001; 34 S. L. R. 533; 4 S. L. T. 349.

The pursuer was injured by trying to save a fellow-workman from danger. He would not have been injured had he not voluntarily made the attempt to save the fellow-worker. There was evidence of negligence on the part of the defenders. They pleaded that the risk was voluntarily run.

HELD (*per* Lord Young)—the pursuer was under a duty to attempt to save the life and limbs of his companion and consequently the risk was not voluntarily run.

Per Lords M'Laren, Kinnear and Moncreiff: Where two persons are exposed to a common danger by the fault of a third person and one of the two who might have saved himself elects (on the impulse of the moment) to save the other, and is injured, it is a jury question whether such injuries are not fairly attributable to the fault of the third person.

Per Lord Justice-Clerk (Lords Adam and Trayner, *diss.*): The maxim *Volenti non fit injuria* applied.

3213.—M'Monagle v. Baird & Co. (1881), 9 R. 364; 19 S. L. R. 256.

The roof of a working in a mine was insecure. The pursuer, a miner, was aware of this and told the oversman. The oversman had it inadequately secured. The roof fell in and the miner was injured.

HELD—that he was not barred from claiming compensation under the Act by the fact that he had gone on working in knowledge of the danger.

3214.—Gallacher v. Woodrow (1891), 28 S. L. R. 385.

The pursuer was told to do a certain piece of work by a person to whose orders he was bound to conform. He thought it dangerous and told the person so. He was injured.

HELD—action not barred by the mere fact that he appreciated the danger and still obeyed.

3215.—Sanders v. Barker & Son (1890), 6 T. L. R. 324.

In an action under the Employers' Liability Act, 1880, the jury found that the plaintiff knew of the defect (in the machinery which caused the injury) and worked voluntarily, but not with a full knowledge of the risk he incurred: though he knew that an accident might occur. The defendants had been warned of the defect.

HELD (on those findings)—that judgment must be entered for the plaintiff.

Comments by Lord Coleridge, L.C.J., on the meaning of the word 'voluntarily.'

Notes.—With the comments made by Coleridge, L.C.J., during argument in this case may be contrasted the *dictum* of Lord Bramwell in *Membersy v. Great Western Railway* (1889), 14 A. C. 179, 187: "Where a man is not physically constrained, where he can at his

option do a thing or not, and he does it, the maxim *Volenti non fit injuria* applies." See now *Smith v. Baker* [3209].

3216.—Baddeley v. Granville (Earl) (1887), 56 L. J. Q. B. 501; 19 Q. B. D. 423; 57 L. T. 268; 36 W. R. 63; 51 J. P. 822.

The plaintiff's husband had been employed in the defendant's coal mine. One of the rules established in the mine under s. 52 of the Coal Mines Regulation Act, 1872, required a banksman to be constantly present while the men were going up or down the shaft; but it was the regular practice of the mine, as the plaintiff's husband well knew, not to have a banksman in attendance during the night. The plaintiff's husband was killed in coming out of the mine at night by an accident arising through the absence of a banksman. In an action under the Employers' Liability Act, 1880.

HELD—that the defence arising from the maxim *Volenti non fit injuria* was not applicable in cases where the injury arose from the breach of a statutory duty on the part of the employer, and that the plaintiff was entitled to recover.

Thomas v. Quartermaine [3208] discussed.

3217.—Yarmouth v. France (1887), 57 L. J. Q. B. 7; 19 Q. B. D. 647; 36 W. R. 281.

In an action to recover compensation under the Employers' Liability Act, 1880, it appeared that the plaintiff was in the employment of the defendant, who was a wharfinger, and for the purposes of his business the owner of carts and horses. It was the duty of the plaintiff to drive the carts and to load and unload the goods which were carried in them. Among the horses was one of a vicious nature and unfit to be driven even by a careful driver. The plaintiff objected to drive this horse, and told the foreman of the stable that it was unfit to be driven, to which the foreman replied that the plaintiff must go on driving it, and that if any accident happened his employer would be responsible. The plaintiff continued to drive the horse, and while sitting on his proper place in the cart was kicked by the animal and his leg was broken.

HELD (Lopes, L.J., *diss.*)—that upon the facts a jury might find the defendant to be liable, for there was evidence of negligence on the part of his foreman, and the circumstances did not conclusively show that the risk was voluntarily incurred by the plaintiff.

Thomas v. Quartermaine [3208] distinguished.

Per Lopes, L.J.: That there was no evidence for the jury of the defendant's liability, inasmuch as the facts showed that the plaintiff, with full knowledge of the risk to which he was exposed, had elected to continue in the defendant's employment. See *Woodley v. The Metropolitan Railway Co.* [3086].

3218.—Brooke v. Ramsden (1890), 63 L. T. 287; 55 J. P. 262.

A workman, whose duty it was to attend to and work at a machine that was defective and of which defect he had knowledge, continued to work at the machine, notwithstanding the master's refusal to repair it when the defect was brought to his notice by the workman.

In consequence of the defect the workman was obliged to stand upon the "bed" or plate of the machine to adjust a part of it, and whilst doing so received injuries.

HELD—that the plaintiff's knowledge of the defect did not amount to that thorough comprehension of the risk incurred which alone would justify the case being withdrawn from the jury.

Per Cave, J.: "If everyone who complained or knew of a defect was held to be disentitled to recover, bad masters would only have to point out defects to put themselves in a better position than masters who took all possible pains to ensure the safety of their workmen."

3219.—Church v. Appleby (1888), 58 L. J. Q. B. 144; 60 L. T. 542.

Where a workman was employed on a staging in the middle of the river Thames, which was protected on one side only, and it was part of his duty to work on the unprotected side, and in the course of his employment he fell over at night and was drowned, the jury found that the structure was defective, and that the deceased lost his life in consequence of the defect; but they also found that he knew of the defect, and was willing to incur the risk.

HELD—that his widow could not recover damages from his employer.

3220.—M'Sorley v. Steel Co. of Scotland (1893), 20 R. 722; S. L. R. 633; 1 S. L. T. 28.

Per Lord M'Laren (at 20 R., p. 723): "... the Employers' Liability Act gives no new right of action to anyone, but only limits the application of the well-known defence of collaboration which has been held to arise at common law."

Notes.—We place this case under the defence of consent because the doctrine of common employment is the most important application of the maxim *Volenti non fit injuria* at common law. It is this part of the maxim which the Act of 1880 has destroyed in cases which fall within s. 1 of the Act.

3221.—M'Laughlan v. Colin Dunlop & Co. (1882), 20 S. L. R. 271.

The Employers' Liability Act, 1880, destroys the defence of common employment in cases to which the Act applies.

VII. *Contracting Out.*

3222.—Griffiths v. Dudley (Earl) (1882), 51 L. J. Q. B. 543; 9 Q. B. D. 357; 47 L. T. 10; 30 W. R. 797; 46 J. P. 711.

It is competent to a workman to contract with his employer not to claim compensation for personal injuries under the Employers' Liability Act, 1880. By s. 1 of the Employers' Liability Act, 1880, where personal injury is caused to a workman in certain specified cases, the workman, or in case the injury results in death, his legal personal representatives, and any person entitled in case of death.

“ shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of, nor in the service of, the employer, nor engaged in his work.” A workman having contracted with his employer for himself and his representatives, and any person entitled in case of death, not to claim any compensation under the act for personal injury, whether resulting in death or not.

HELD—that s. 1 only affected the contract of service so far as to negative the implication of an agreement by the workman to bear the risks of the employment, and therefore did not render the workman's express contract not to claim compensation invalid.

HELD ALSO—that the contract was not against public policy, and that the workman's widow, suing for damages under Lord Campbell's Act, was bound by it.

3223.—Clements v. London and North Western Railway Co., [1894] 2 Q. B. 482.

The plaintiff on entering the employment of the defendants and while yet an infant entered into a contract whereby he obtained the advantages of an accident insurance scheme in lieu of his rights under the Employers' Liability Act. The accident society was formed of the employees of the defendants. The defendants contributed to the funds. The insurance covered all accidents save those wilfully caused, etc., the relief was less than the limit recoverable under the Act. The assured was liable to forfeit his benefits if he failed to give notice or infringed certain of the regulations. There was an arbitration clause. The plaintiff sustained an accidental injury. He sued the defendants.

HELD—that the agreement to become a member of the insurance society was a part of the contract of service which it was competent for an infant to enter into, and that it was an answer to the present action; the above-mentioned agreement being, on the whole, for the infant's benefit.

Notes.—On the point that an infant may bind himself by contracts for his benefits, see *Rex v. Hindringham*, 6 T. R. 557; *Leslie v. Fitzpatrick*, 3 Q. B. D. 229; *Corn v. Matthews*, [1893] 1 Q. B. 310; *Drury v. Drury*, 2 Eden, 39; *Maddon v. White*, 2 T. R. 159; *Earl of Buckinghamshire v. Drury*, 2 Eden, 60; *Edwards v. Carter*, [1893] A. C. 360. The question benefit or not is for the court (*Flower v. London and North Western Railway*, [1894] 2 Q. B. 65).

VIII. Notice of Injury.

(See ss. 4 and 7 of the Act.)

3224.—Moyle v. Jenkins (1881), 51 L. J. Q. B. 112; 8 Q. B. D. 116; 46 L. T. 472; 30 W. R. 324.

By the Employers' Liability Act, 1880, s. 4, an action for the recovery under this Act of compensation for an injury shall not be maintainable, unless “ notice that injury has been sustained ” is

given within six weeks. By s. 7, notice in respect of an injury under this Act shall give the name and address of the person injured, and shall state in ordinary language the cause of the injury and the date, and shall be served on the employer, and may be served by delivery or by post.

HELD—that notice under the Act must be in writing.

3225.—*Keen v. Millwall Dock Co.* (1881), 51 L. J. Q. B. 277 ; 8 Q. B. D. 482 ; 46 L. T. 472 ; 30 W. R. 503 ; 46 J. P. 435—C. A.

The plaintiff, a workman, was injured by an accident while in the employ of the defendants ; he at once told an inspector of the defendants' the circumstances of the accident, and the inspector made a written report on the accident to the defendants. The solicitor of the plaintiff wrote to the defendants within a week asking for compensation, mentioning that the defendants' superintendent knew the particulars, but not referring in terms to the written report made by the inspector ; no other notice was given within six weeks.

HELD—that there was no sufficient notice in writing to satisfy the requirements of the Employers' Liability Act, 1880.

HELD ALSO—the notice must contain in writing all the particulars required by s. 7 in order to fulfil the condition precedent to bringing an action enacted by s. 4, but a notice shall not be deemed invalid by reason of any defect or inaccuracy, unless the judge shall be of opinion that the defendant is prejudiced or that there was an intention to mislead.

Quare, if such notice can be made by one writing referring to another writing.

3226.—*Previdi v. Gatti* (1888), 58 L. T. 762 ; 36 W. R. 670 ; 52 J. P. 646.

A notice given to an employer under ss. 4 and 7 of the Employers' Liability Act, 1880, omitted to give the address of the person injured, or to state the cause of the injury, and the date at which the injury was sustained was wrongly given. The accident occurred on August 9th. The letter giving notice was served on the defendants by post by an unregistered letter on September 19th, and to this letter the defendants replied on September 23rd. The county court judge, before whom the action was tried, found that the defendants had not been prejudiced in their defence by the defects and inaccuracy in the notice, and that such defects and inaccuracy were not for the purpose of misleading. It was proved that the notice was posted on September 19th.

HELD—that the county court judge having found that the defendants were not prejudiced in their defence by the said defects and inaccuracy in the notice, and that they were not for the purpose of misleading, the notice was good within the meaning of ss. 4 and 7 of the Employers' Liability Act, 1880.

HELD ALSO—that it having been proved that the letter containing the notice was posted on September 19th, and a reply to it having been received from the defendants, there was sufficient evidence

that the notice had been received by the defendants within the time specified in s. 4 of the Act, although the letter containing the notice was not registered.

Notes.—*Keen v. The Millwall Dock Co.* [3225] distinguished; compare *Stone v. Hyde* [3227].

3227.—*Stone v. Hyde* (1882), 51 L. J. Q. B. 452; 9 Q. B. D. 76; 46 L. T. 421; 30 W. R. 816; 46 J. P. 788.

The notice of injury under s. 7 of the Employers' Liability Act, 1880, need not be expressed in strictly technical language; it is enough if it substantially conveys to the mind of the person to whom it is given, the name and address of the person injured, and the cause and date of the injury. A letter from the plaintiff's solicitor gave only the date of the injury, and stated that the plaintiff was and had for some time past been under treatment at a hospital "for injury to his leg."

HELD—that having regard to the proviso at the end of s. 7, the defect in the notice did not render it invalid.

3228.—*Carter v. Drysdale* (1883), 53 L. J. Q. B. 557; 12 Q. B. D. 91; 32 W. R. 171.

Sect. 7 of the Employers' Liability Act, 1880, provides that the notice shall state (*inter alia*) the date of the injury; and "a notice under this section shall not be deemed invalid by reason of any defect or inaccuracy therein" unless the judge who tries the action shall be of opinion that the defendant is prejudiced in his defence by such defect or inaccuracy, and that it was for the purpose of misleading. A notice of injury given under s. 4 omitted to state the date of the injury, and the judge at the trial found that the defendant was not prejudiced in his defence by the omission, and that it was not for the purpose of misleading.

HELD—that the omission of the date was a "defect or inaccuracy" in the notice within the meaning of s. 7, and did not render the notice invalid unless the defendant was prejudiced or there was intention to mislead.

3229.—*Rathbone v. Ross* (1891), 35 S. J. 208.

It is sufficient if notice under the Employers' Liability Act, 1880, is addressed to the principal partner in the employing firm, although he is dead, and the business is being carried on by trustees under his will, but in his name and at the old address.

3230.—*Beckett v. Manchester Corporation* (1888), 52 J. P. 346.

It is not a fatal objection to an action brought by a servant under the Employers' Liability Act, 1880, against his employer to omit the address and date in the notice required to be given to the employer under s. 7.

Per Field, J.: "It matters not how defective the notice was, if it can be shown that it has not injured the defendants, that is to say,

if the defendants are not taken by surprise, at the trial, in consequence of the defect."

3231.—Clarkson v. Musgrave (1882), 51 L. J. Q. B. 525 ; 9 Q. B. D. 386 ; 31 W. R. 47.

In an action to recover compensation for injuries under the Employers' Liability Act, 1880, the plaintiff's notice of injury stated that she was injured in consequence of the defendant's negligence in leaving a certain hoist in their warehouse unprotected, whereby her foot was caught in the casement of the hoist and crushed. At the trial, the jury found that the accident occurred through the negligence of a superintendent in the warehouse, in allowing the plaintiff, a young girl, to go in the hoist alone.

HELD—that the notice of injury sufficiently stated "the cause of the injury" within s. 7.

3232.—Thomson v. Robertson & Co. (1884), 12 R. 121 ; 22 S. L. R. 97.

A letter from the wife of the workman to the employer in the following terms : "I find I will need some more money, and will you please oblige me with ten shillings. It is now five weeks since Adam got his accident. His jaw is so badly smashed that he will never be the same man again. Adam has been advised to get damages from you."

HELD—a sufficient notice of the injury.

3233.—Thomson v. Baird & Co. (1903), 6 F. 142 ; 41 S. L. R. 152 ; 11 S. L. T. 510.

A notice of claim under the Workmen's Compensation Act, 1897, is not good as a notice of injury under the Employers' Liability Act, 1880, although the notice of claim stated the name and address of the injured man and the nature of the accident, the two kinds of claim being inconsistent.

Notes.—It should be borne in mind when considering this case that the Act of 1880 does not require a notice of claim or a notice of action to be given but a notice of injury. Note also, the proviso to s. 7. The distinction mentioned does not seem to have been sufficiently considered by the court.

3234.—M'Govan v. Tancred, Arrol & Co. (1886), 13 R. 1033 ; 23 S. L. R. 737.

The letter giving notice need not be registered but in such a case it is necessary to prove delivery.

Notes.—See on this point *Previdi v. Gatti* [3226].

3235.—M'Donagh or Henderson v. MacLellan (1886), 13 R. 1000 ; 23 S. L. R. 717.

The injured workman posted a letter giving notice of injury within

the six weeks but it could not have been delivered within the time limit.

HELD—notice not given within the six weeks.

3236.—Connolly v. Young's Paraffin Oil Co. (1894), 22 R. 80 ; 32 S. L. R. 61 ; 2 S. L. T. 306.

Grief and anxiety do not constitute a “ reasonable excuse ” within the meaning of s. 4, proviso.

3237.—M'Fadyen v. Dalmellington Iron Co. (1897), 24 R. 327 ; 34 S. L. R. 266 ; 4 S. L. T. 245.

A father claiming damages for the death of his son failed to give notice of injury within six weeks as required by s. 4 of the Act. His excuse was that he was “ an old man, illiterate, and not aware of the necessity of giving notice, and that it was not known whether the deceased would survive.”

HELD—that this was not a “ reasonable excuse ” within the meaning of the proviso to s. 4.

3238.—Traill v. Kelman & Co. (1887), 15 R. 4 ; 25 S. L. R. 8.

Whether an excuse is reasonable within the meaning of s. 4, proviso, may be decided by the court at the adjustment of issues, or may in their discretion be postponed for the decision of the judge who tries the cause.

3239.—Johnston v. Shaw (1883), (O. H.) 21 S. L. R. 246.

An action under the Act of 1880 was raised after the expiry of six months from the action, contrary to s. 4. The pursuer alleged that he was insane as a result of the accident for six months thereafter.

HELD—that the allegation did not elide a plea that the action was not maintainable under the Act.

IX. *Procedure—Assessment of Damage.*

See ss. 6 and 3 as to trial of actions and limit of compensation respectively ; ss. 4 and 7, as to limit of time in which to bring action, notice of injury and form of notice (and see, *supra*, VIII.) ; s. 1 as to who may bring action (and see pp. 1398, 1399, *supra*).

3240.—Munday v. The Thames Ironworks and Shipbuilding Co., Ltd. (1882), 10 Q. B. D. 59.

The power to remove a case commenced in the county court under the Employers' Liability Act, 1880, ought only to be exercised in exceptional cases. Application not granted where the grounds urged for the removal were (1) defective notice under the Act ; (2) desire on part of plaintiff to consolidate action under the Act with one at common law commenced in the High Court ; (3) questions arising complex and showing legal difficulty.

Notes.—For a case where the action was removed on the grounds (1) difficult points of law, (2) unsatisfactory that cause should be tried in the immediate neighbourhood of the place where the cause of action arose, see *Bates v. Warner* (1889), 5 T. L. R. 582 (the defendant in that case undertook to pay all extra costs incurred in any event).

3241.—M'Evoy v. Waterford Steamship Co. (1884), 16 L. R. Ir. 291.

An action to recover damages for personal injuries occasioned through the negligence of a fellow-servant of the plaintiff having been brought in the county court, under the Employers' Liability Act, 1880, the plaintiff obtained a conditional order to have it removed into a superior court. The plaintiff's wages were £60 a year, and he claimed £180 damages. There was medical evidence showing that he had sustained serious and permanent injury, and it was admitted that more than £50 might reasonably be awarded: but there were not any other special circumstances shown in support of the application.

HELD—that the county court would have power to award damages exceeding £50, and for any amount within the statutory limit of three years' wages, and *per* Dowse, B. (*Andrews, J., diss.*), that no sufficient grounds were shown for the removal of the action from the county court.

3242.—Reg. v. City of London Court Judge or Claxton v. Lucas (1885), 54 L. J. Q. B. 330; 14 Q. B. D. 905; 52 L. T. 537; 33 W. R. 700—C. A.; affirming 49 J. P. 407.

Sect. 39 of the County Courts Act, 1856, entitles the defendant "in any action of tort," where the claim exceeds £5, to a stay of proceedings upon certain conditions as to giving security for the amount claimed, and the costs of trial in one of the superior courts of common law.

HELD—that this section was intended to apply only to actions which could be brought either in one of the superior courts or in a county court, and therefore did not apply to an action under the Employers' Liability Act, 1880, which by s. 6 of that Act must be brought in a county court.

3243.—Hanrahan v. Limerick Steamship Co. (1886), 18 L. R. Ir. 135.

In an action commenced in the civil bill court to recover damages for the death of the plaintiff's late husband, who had died from injuries sustained while employed as second mate and pilot on board a steamer of the defendants, and also in superintendence of the loading and discharging of cargo, the plaintiff applied to move the action into the superior court.

HELD—that it did not sufficiently appear from the plaintiff's affidavit, which described the employment of the deceased as above stated, that the deceased was a workman within the meaning of the Employers' Liability Act, 1880, and that the application should

therefore be refused. It lies upon the party making such application to show distinctly that the case comes within the statute.

3244.—Clark v. Adams (1885), 12 R. 1092.

This action was originally laid at common law and was decided against the pursuer. On appeal leave to amend the record and to proceed as under the Employers' Liability Act, 1880, on the ground that the agent (solicitor) originally instructed had given notice under the Act, but had died and the agent subsequently instructed had no knowledge that notice had been given, was refused, on the ground that six months had elapsed since the date of the accident.

3245.—Conroy v. Peacock, [1897] 2 Q. B. 6.

The defendant cannot rely on the defence that notice of injury as required by s. 4 of the Employers' Liability Act, 1880, has not been given, unless he has given notice that he intends to rely upon it as a "statutory defence," pursuant to Order X., rr. 10 and 18, of the C. C. R.

3246.—Gillett v. Fairbank (1887), 3 T. L. R. 618.

An action under the Employers' Liability Act, 1880, cannot be maintained against the employer's executors.

3247.—Morrison v. Baird & Co. (1882), 10 R. 271; 20 S. L. R. 185.
See S. C. [3112].

A. proceeded against the defenders both at common law and under the Act of 1880. It was removed by the pursuer under the provisions of s. 6 to the Court of Session. The defenders pleaded that only the claim under the statute was brought into the Court of Session.

HELD—that the whole action as raised was transferred to the Court of Session.

3248.—Wehlin v. Ballard (1886), 55 L. J. Q. B. 395; 17 Q. B. D. 122; 54 L. T. 532; 34 W. R. 455; 50 J. P. 597. See S. C. [3198].

Upon an appeal from the judgment of a county court awarding compensation under the Act, the High Court is not entitled to consider whether the findings are such as the High Court would have arrived at, but can only consider whether or not there was reasonable evidence to support them.

3249.—Noel v. Redruth Foundry Co., [1896] 1 Q. B. 453; 65 L. J. Q. B. 330; 74 L. T. 196; 44 W. R. 407.

In s. 3 of the Employers' Liability Act, 1880, the word "earnings" means money or things capable of being turned into money by accurate estimation, such as rent, food, and clothes; but it does not include a thing so vague as tuition which an apprentice receives from his master.

3250.—Borlick or Bortick v. Head (1885), 53 L. T. 909 ; 34 W. R. 102 ; 50 J. P. 327.

The plaintiff, in an action brought under the Employers' Liability Act, 1880, proved as damages loss of wages in respect both of his employment with the defendants, and also in respect of certain overtime labour under another employer. The jury awarded damages under both heads, but the county court judge held that the plaintiff was only entitled to receive damages in respect of his estimated earnings under the defendants. The amount of damages awarded was less than the amount he might have been awarded in respect of his estimated earnings for three years in the defendants' service.

HELD—that s. 3 of the Employers' Liability Act, 1880, does not give a measure of damages, but only a limit within which the jury may award damages, and that the plaintiff was entitled to recover in respect of both employments.

Scots lawyers may find it convenient to refer to the following cases upon the form of issues, relevancy, process, etc. :—

Gillon v. Ramage and Ferguson (1885), 12 R. 1192 ; 22 S. L. R. 796.

Magee v. Dalglish, Falconer & Co., Ltd. (1884), 11 R. 857 ; 21 S. L. R. 569.

Milligan v. Muir & Co. (1891), 19 R. 18 ; 29 S. L. R. 36 ; followed in *Cameron v. Walker* (1898), 25 R. 449.

Macleod v. Caledonian Railway Co. (1885), 23 S. L. R. 68.

Moore v. Ross (1890), 17 R. 796 [3172].

Gillies v. Scott & Co. (1903), 5 F. 1118.

Mackay v. Watson (1897), 24 R. 383 ; 34 S. L. R. 314 ; 4 S. L. T. 240.

Waterson v. Murray & Co. (1884), 11 R. 1036 ; 21 S. L. R. 695.

Black v. Barclay, Curle & Co. (1896), 34 S. L. R. 123 ; 4 S. L. T. 221.

M'Gee v. Eglinton Iron Co. (1883), 10 R. 955 ; 20 S. L. R. 649.

M'Mullen v. Newhouse Coal Co. (1896), 23 R. 759.

Casey v. Sinclair and Son (1886), 23 S. L. R. 305.

Little v. Paterson and Son (1890), 28 S. L. R. 64.

M'Sorley v. Steel Co. of Scotland (1893), 20 R. 722.

Jackson v. M'Alpine (1893), 30 S. L. R. 45.

M'Coll v. Black and Eadie (1891), 18 R. 507.

As to costs, see *Macdonald v. Wylie and Sons* (1898), 1 F. 339, and compare *Gibson v. Nimmo & Co.* (1895), 22 R. 491.

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